

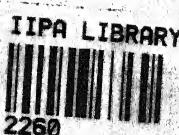
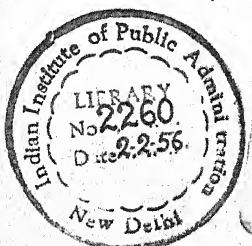
# THE SCOTTISH POLICE.

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AN OUTLINE  
OF THEIR  
POWERS AND DUTIES

*by*

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## PREFACE

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IN this volume, I have made an attempt to present, in readable form, an outline of (1) the constitution of the Scottish police forces ; (2) the control of these forces by the Secretary of State, the sheriffs, justices and magistrates, the local authorities and the chief constables ; (3) the position of constables in the community ; the duties of constables to befriend the law-abiding members of the community, to save life and protect property, to maintain order, to prevent, detect and investigate crime, to deal with emergencies and suspicious circumstances (accidents, fires, sudden deaths), to bring offenders to justice, to assist the criminal authorities and courts, and to carry out the many and varied duties entrusted by statute to the police ; and (5) the powers with which, to these ends, the police are clothed at common law and by Act of Parliament.

Every effort has been made to present the material in such form as to permit easy reference. Care has been taken with the index, on the view that a comprehensive index, embracing all headings likely to suggest themselves to a reader seeking guidance on a particular point, is an important part of any legal text book. A full citation of authorities is given in the text, but in such a way as to interfere as little as may be with the continuity of the narrative. Every precaution has been taken to supply references which are up-to-date ; but, especially in the case of emergency legislation of a temporary character (e.g., the Defence (General) Regulations), the reader must be on his guard, for the law of the land changes from day to day.

The volume contains certain unique features which, it is hoped, will prove of service. These include a rather fuller treatment than is found in existing textbooks of the procedure following the arrest of a suspect ; a series of hints to police witnesses,

suggested by my daily experience in court over a period of twenty years ; and lists of (1) the statutory powers of arrest without warrant ; (2) the statutory powers of entry upon land and into private premises ; (3) the statutory powers to seize property ; and (4) other miscellaneous powers conferred upon the police by Act of Parliament. Except in the first case (where I have preferred a chronological arrangement), these powers appear under alphabetical subject-headings.

I take the opportunity of thanking those police officers and others, in Edinburgh and elsewhere, who have allowed me to draw upon their practical experience of matters of police routine.

I am much indebted to my Depute, Mr. J. D. Heatly, for his assistance and for a number of valuable suggestions.

JAMES MILL.

POLICE CHAMBERS,  
EDINBURGH, 1944.

## CHAPTER I

### THE POLICE FORCES OF SCOTLAND

IN Scotland, there are, at the time of writing, 49 separate Police Forces—including Orkney and Zetland. Of these, 31 are county and 18 burgh forces. They vary greatly in size, as appears from the following selected normal peace-time strengths:—

Zetland, 6 ; Orkney, 9 ; Peeblesshire (the smallest force on the mainland), 16 ; and, at the other end of the scale, Edinburgh, 800 ; Glasgow, 2,350. The figures for Edinburgh and Glasgow are approximate.

The strength of each force is determined by the local authority, subject to the approval of the Secretary of State for Scotland (Police (Scotland) Act, 1857, sections 1 and 5, as affected by the Local Government (Scotland) Act, 1929 ; Burgh Police (Scotland) Act, 1892, section 78 ; and the corresponding sections of local police acts ; Police (Scotland) Regulations).

Separate burgh forces may now be maintained only by (1) burghs which in 1929 had a population of at least 20,000 and maintained a separate police force ; (2) Arbroath, to which a special concession was made ; (3) burghs which had then a population of at least 50,000 ; and (4) burghs which have since reached that figure. (Local Government (Scotland) Act, 1929, section 3).

In peacetime, the total number of regular police officers is over 7,000, and of "specials" over 14,000. During the war there have also been various classes of police auxiliaries, male and female, paid and unpaid.

#### **APPOINTMENT.**

##### **1. The Chief Constable.**

*Counties.* The chief constable of a county force is appointed by the County Council. (Police (Scotland) Act, 1857, as affected by the Local Government (Scotland) Acts of 1889 and 1929).

*Burghs.* Except in Glasgow and Aberdeen, the chief constable of a burgh is appointed by the Town Council. In Glasgow, the appointment is vested in the magistrates and the Sheriff Principal, and in Aberdeen in the Town Council and the Sheriff Principal. (Burgh Police (Scotland) Act, 1892, section 78 and the corresponding sections of local acts).

All appointments, whether in counties or burghs, are subject to the approval of the Secretary of State for Scotland and must conform to the requirements of the Police (Scotland) Regulations. These regulations, to which frequent reference will be made in this chapter, are made by the Secretary of State for Scotland under the Police Act, 1919. From time to time, an issue is made by H.M. Stationery Office of the Regulations embodying amendments to date.

## 2. Constables.

*In Counties.* Appointments are made by the chief constable, subject to the approval of the Police Committee. (Police (Scotland) Act, 1857, section 6). The functions of the Police Committee are now exercised by the County Council. (Local Government (Scotland) Acts, 1889 and 1929).

*In Burghs.* Appointments are made by the chief constable—no approval by the local authority is necessary. (Burgh Police (Scotland) Act, 1892, section 78, and the corresponding provisions of local police acts).

All appointments of constables, whether in counties or burghs, must conform to the Police (Scotland) Regulations.

*The Oath.* On appointment, constables (or chief constables) make an oath or declaration that they will "faithfully discharge the duties of the office of constable." (1857 Act, section 11; 1892 Act, section 79; and local acts). No oath of allegiance is required.

## DISMISSAL OF (1) CHIEF CONSTABLE AND (2) CONSTABLES.

The chief constable of a county can be dismissed by the County Council. (1857 Act, section 4, as affected by the Local Government (Scotland) Acts of 1889 and 1929). In a burgh, the chief constable is removable by the Town Council "with the approbation of the chief magistrate of the burgh." (1892 Act, section 78, as amended by the Police Appeals Act, 1927, section 6). In the five "exempted" burghs, the dismissal of the chief constable is provided for in the local acts. As to appeal, see below.

In all cases (except officers of the rank of lieutenant or upwards in Glasgow, who are dismissible by the Magistrates' Committee), constables may be dismissed by the chief constable. (1857 Act, section 6; 1892 Act, section 78; local police acts). The only remedy open to a constable who feels aggrieved by his dismissal would appear to be that of appeal, as explained in the next paragraph. Even an averment that the chief constable was actuated by malicious motives does not justify an action for damages for

wrongous dismissal. So far as the courts are concerned, the power of dismissal is absolute. (*Brown v. Edinburgh Magistrates and Ross.* 1907. S.C. 256.)

Since 1927, any member of a police force who is dismissed or required to resign as an alternative to dismissal has had a right of appeal. (Police (Appeals) Act, 1927). In Scotland, the Secretary of State is directed, "unless it appears to him that the case is of such a nature that it can properly be determined without taking oral evidence," to instruct an enquiry and report to him by the Sheriff Principal. On consideration of this report, with any other relevant documents, he may allow or dismiss the appeal or vary the punishment by substituting some other punishment which the disciplinary authority might have awarded. The extended right of appeal given by the Police (Appeals) Act, 1943, is noted under the heading "Discipline" later in this chapter.

The common law right of the magistrates to dismiss police officers (last asserted in *McKay v. Cogan.* 1834. 13 S. 164) may be disregarded in modern practice. The power given to the magistrates by section 494 of the Burgh Police (Scotland) Act, 1892, to direct the chief constable to dismiss a constable, remains unrepealed. In the unlikely event of its exercise, an appeal to the Secretary of State would be competent under the Act of 1927. A similar power in the City of Edinburgh was allowed to lapse in 1933.

#### **QUALIFICATIONS FOR APPOINTMENT.**

##### **1. The Chief Constable.**

Applicants for the post of chief constable, whether of a county or burgh police force, must be under 45 years of age or, in the case of an applicant who is a serving member of a force, under 55 years of age. No person without previous police experience of not less than five years may be appointed. (Police (Scotland) Regulations, Nos. 7 and 9).

##### **2. Constables (Male).**

A candidate for appointment to a police force must produce satisfactory references as to character, and, if he has served in any branch of the Armed Forces of the Crown or in the civil service or in a police force, must produce satisfactory proof of good conduct while so serving. A person dismissed from any such service or force is not eligible.

The normal age limits are 18 to 30 years, but concessions are made in favour of persons immediately transferred from another police force and persons who have, within the three months imme-

diatey preceding appointment, served in the Navy, Army or Air Force, who are eligible up to the age of 35.

The national minimum height is 5 feet 8 inches, but certain forces insist upon a higher minimum.

The candidate must be certified by the medical officer of the force as "in good health, of sound constitution and fitted both physically and mentally to perform the duties of his office."

The applicant must pass an educational test in reading, writing and arithmetic. (Police (Scotland) Regulations No. 7). Each chief constable sets the examination for applicants to enter his particular force. There is no uniform test applicable to all intrants to the Scottish forces.

### **3. Constables (Female).**

The requirements as to character, medical examination and education apply as in the case of men.

The candidate must be unmarried or a widow; not under 22 or over 35 years of age; not less than 5 feet 4 inches in height. The age limits may be relaxed in the case of a candidate who has previous service in a police force or in other special circumstances approved by the Secretary of State.

A woman member of a police force must resign on marriage or remarriage. (Police (Women) (Scotland) Regulations No. 4).

*Probationary Period.* On first appointment, a constable, man or woman, is on probation for a year. This period may be extended, at the chief constable's discretion, for a further six months. Concessions are made to persons who have served in another force. During this period, the services of a constable may be dispensed with at any time, if the chief constable considers that he is not likely to become efficient and well-conducted, on a week's notice or pay in lieu. (Police (Scotland) Regulations, Nos. 10 and 11, and corresponding Regulations for women).

### **RANKS AND PROMOTION.**

The recognised ranks in a Scottish police force are—for men—Chief Constable; Superintendent; Lieutenant; Inspector; Sergeant; Constable. The additional ranks of Assistant Chief Constable and Chief Superintendent may, subject to the approval of the Secretary of State, be adopted where circumstances render this desirable. In forces where the rank of acting sergeant was in existence before 1930, this rank may be retained until discontinued by the Secretary of State on the report of H.M. Inspector that it is no longer necessary.

No person can be appointed as assistant chief constable, superintendent or lieutenant unless he has previous police experience of not less than five years. This rule is absolute. It cannot be waived in special circumstances, as may the corresponding condition of promotion to lower rank—see below. (Police (Scotland) Regulations, Nos. 1, 2 and 9).

The recognised ranks for women are—Inspector; Sergeant; Constable. Intermediate or other ranks may be adopted, subject to the approval of the Secretary of State. (Police (Women) (Scotland) Regulations, No. 1).

*Promotion.* One cannot be in close touch with the police over a period of years without realising how greatly the efficiency of a police force depends upon discriminating selection of members to fill vacancies in the higher ranks. Promotion should be just and imaginative. Where, either through influence or imperfect assessment of character and ability, promotion is misplaced, the discipline and effectiveness of the force may be profoundly affected. As with other public services, automatic advancement by seniority is a danger. The selection of officers must give anxious concern to the chief of a large force, who cannot know each man personally but must be guided largely by the opinion of the man's immediate superior.

Promotion is a matter very much in the hands of the chief constable; but not entirely so. He is restricted in his choice by the insistence of the Regulations that no member of a force is to be promoted to the rank of sergeant or inspector unless (1) he has completed five years' service and has, for the last two years, been free from punishment other than reprimand or caution; (2) he has, after completing not less than four years' service, passed an examination in educational subjects and police duties; and (3) except in the case of a person suffering from disability sustained during active service in the Navy, Army or Air Force, he has had not less than one year's continuous service on outside police duty. Where a chief constable is satisfied that the person whom he has selected for promotion "possesses special qualifications for the performance of the particular duties on which he is to be employed," he may dispense with the need for completion of five years' service as a condition of promotion or may permit the qualifying examination to be taken before the completion of four years' service. (Police (Scotland) Regulations, Nos. 26 and 27; Police (Women) (Scotland) Regulations, Nos. 27 and 28). The nature of the examination for promotion is set out in detail in the Regulations.

The examination papers are, in Scotland, set and corrected by a specially constituted Board, on which one finds representatives of the Scottish Education Department, the Chief Constables'

Association, the Superintendents' and Lieutenants' Council, and the Police Federation. This results in the application throughout Scotland of a uniform test for promotion. (Contrast with the entrance examination, where the standard may vary from force to force).

At the time of writing, there is no separate test of qualities of leadership and initiative, although this has been mooted.

Although normally a member of a police force advances one step at a time—constable to sergeant, sergeant to inspector, and so on—it is competent to promote a constable directly to the rank of inspector or other higher rank.

#### CONDITIONS OF SERVICE.

The Regulations prescribe in great detail the pay, allowances, hours of duty, holidays and equipment of various ranks. The pay of the women police is on a lower scale than that of the men. The normal daily period of duty is 8 hours, but, in the case of women wholly or mainly on patrol duty, a seven-hour daily period may be prescribed.

Burgh police authorities are directed by statute to make such arrangements that every member of the police service not above the rank of inspector shall be allowed at least 52 days in a year on which he is not required to perform police duty, save on occasions of emergency, and to distribute these days throughout the year "with the object of securing, so far as practicable, to every constable one day's rest in every seven." (Police (Weekly Rest-Day) (Scotland) Act, 1914). A similar requirement applies to County police authorities who have fixed a date for the application of the Act to their area.

The Police Pensions Act, 1921, makes elaborate provision for the compulsory retirement on pension of police officers at ages varying with the rank held, and for payment of pensions to widows, and of allowances to children and dependants. (See *Drummond*, 1937, S.C. 36, and *Garvin v. City of London Police Authority*, 1944, 1 All E.R. 378).

Generally, there has been a marked improvement in the conditions of service of the police, and a corresponding improvement in their standing in the community, during the past 25 years. To men of good physique and character, with ability and qualities of resource and leadership, a police career now presents attractive possibilities. Already, many have been drawn to the service who, before the sitting of the Desborough Committee, would have drifted into the professions, business, or the civil service. While

there is still room for constables of the older type, who have knowledge of how the less fortunate members of the community live from day to day, and who can speak to labouring men in a language which they can understand, the growing complexity of police duties and the widening range and increasing frequency of contacts between the police and all sections of society make it desirable to include in each force a number of officers with a good secondary education. In most of the larger forces, one can now discover men who have graduated, usually in law, either before or after joining the police. One advantage of this better pay and improved conditions is that it permits of the recruitment of specialists—mechanics, wireless operators, photographers, linguists, and the like. As yet, this possibility has been insufficiently exploited.

### **DISCIPLINE.**

As a result of his appointment, a constable becomes subject to a special "Code of Offences against Discipline," which forms the first appendix to the Police (Scotland) Regulations. Additions to the Code may be made by the police authority (i.e., the county or town council) with the approval of the Secretary of State. This Discipline Code is administered by the chief constable in accordance with carefully devised rules of procedure set out in Regulations 12 to 25. An offence against discipline may be punished by dismissal, being required to resign, reduction in rank, reduction in rate of pay for a period not longer than twelve months, forfeiture of merit and good conduct badges, fine not exceeding one week's pay to be recovered in amounts not exceeding one day's pay in any week, reprimand or caution. The distinction between a reprimand and a caution is that the former is, but the latter is not, entered on the offender's conduct sheet. The Code applies both to men and women.

The Police (Appeals) Act, 1927, as amended by the Police (Appeals) Act, 1943, gives a right of appeal to any member of a police force punished by dismissal or by being required to resign as an alternative to dismissal, by reduction in rank or by reduction in rate of pay. Appeal may result in a more severe punishment. A similar right of appeal has recently been made available to wartime personnel.

The maintenance of police discipline is "a matter of vital public interest." In enforcing discipline, a chief constable enjoys "a very high measure of immunity" so long as he acts without malice, and the courts will protect him even if, incidentally, his actions occasion annoyance to a private citizen. (*Robertson v. Keith*. 1936. S.C. 29).

## DISABILITIES.

The Police (Scotland) Regulations impose certain disabilities upon serving members of the police forces.

A male member of a police force may not carry on any business or, without the consent of the chief constable, hold any other office or employment for hire or gain. Nor may he reside, without consent of the chief constable, at any premises where any member of his family keeps a shop or carries on any like business. Nor may he or his wife or any member of his family hold, within the area of the force, a liquor or public entertainments licence or have a pecuniary interest in such a licence. Nor may his wife keep a shop or carry on any like business in the area. (Regulation 8). Similar restrictions apply to the women police. (Police (Women) (Scotland) Regulations, No. 4).

Since the passing of the Police Disabilities Removal Act, 1887, no person has been incapacitated from voting at a parliamentary election by reason of police employment. Where, because of special duty, a constable would be prevented from recording his vote at the polling booth allotted to him, he may present to the presiding officer at any booth a certificate by the chief constable and record his vote there. It should be noted, however, that the prohibition against "endeavouring to induce any elector to give, or abstain from giving, his vote for the choice of any person to be a Member to serve in Parliament," contained in the Police (Scotland) Act, 1857, section 17 is still operative.

Section 16 of the Police (Scotland) Act, 1857, provides that "it shall not be lawful for any constable acting under this Act to receive for his own use any fee for the performance of any act done by him in the execution of his duty as such constable." A similar provision appears in the Burgh Police (Scotland) Act, 1892, section 85. The precise scope of this prohibition is not clear. Not so long ago, it was a common practice for "the man on the beat" to act as knocker-up to residents who had to rise early for work; while constables patrolling residential districts eked out their modest incomes by gratuities received from householders to whose property they had given attention during the holiday months. It is undesirable that police officers should put themselves under any obligation to members of the public, and with the marked improvement in police pay the only real excuse for such practices has disappeared. The Discipline Code now penalises any constable who "directly or indirectly solicits or receives any gratuity, present, subscription or testimonial without the consent of the chief constable or police authority." A further restriction is found in section 15 of the Police Pensions Act, 1921, which

enacts that a pension or allowance under that Act "becomes forfeited, and may be withdrawn by the police authority if the grantee . . . solicits, or, without the consent of the police authority, accepts directly or indirectly any testimonial or gift of a pecuniary value on retirement from the police, or otherwise in connection with his service in the force."

A member of a police force may not be a member of any trade union—except that "where a man was a member of a trade union before becoming a constable, he may, with the consent of the chief officer of police, continue to be a member of that union during the time of his service." (Police Act, 1919, section 2). The prohibition extends to membership of "any association having for its objects, or one of its objects, to control or influence the pay, pensions or conditions of service of any police force." As to the Police Federation, see below.

### **THE POLICE FEDERATION.**

Until 1919, there was available to the police, as a body, no recognized means of ventilating grievances and bringing pressure to bear upon the authorities to readjust irksome conditions of service. The Police Act of that year established "an organisation, to be called the Police Federation, which shall act through local and representative bodies." The Act, in a lengthy schedule, sets out the constitution of the new body and of the Branch Boards, Central Conferences and Central Committees through which it acts. For our present purpose, it is sufficient to note that the Federation is precluded from dealing with questions of discipline and promotion affecting individuals; that the Federation and each branch must be entirely independent of and unassociated with any body or person outside the police service; that the "rank and file" nature of the body is secured by restricting membership to those under the rank of lieutenant (in England, under the rank of superintendent); and that when the Secretary of State proposes to make Police Regulations he must submit a draft to the Scottish Police Council, on which the Federation is represented. The schedule, in its application to Scotland, is modified by the Police Act, 1919 (Scotland) Orders of 14th October, 1919, 22nd March, 1920, and 16th August, 1923.

### **POLICE COUNCILS.**

The Act of 1919 also authorises the Secretary of State to arrange for the holding of Scottish Police Councils "for the consideration of general questions affecting the Police." Each meeting of the Council includes representatives nominated by the Joint Central Committee of the Scottish Police Federation, by the Chief Constables' (Scotland) Association, by the Representative Council

of Superintendents and Lieutenants, and by the three Associations of Scottish Local Authorities. The chair is taken by the Secretary of State—whom failing, an officer of the Scottish Home Department or other person nominated by the Secretary of State. Such councils have been convened at intervals of varying lengths since 1919. The most recent meeting (nineteenth of the series) was held on 21st March, 1944.

### **"ON DUTY."**

### **"IN THE EXECUTION OF HIS DUTY."**

When is a policeman on duty? While the Police (Scotland) Regulations fix the normal period of duty—for constables, sergeants and inspectors—as one of eight hours, they allow for extended periods of duty at the call of the chief constable and provide that "nothing in these Regulations shall affect the obligation of any constable to carry out any lawful orders or to attend at any time to any matter to which it is his duty as a constable to attend." (Regulation 34). In the opinion of the present writer, (1) a constable is not entitled to refuse to turn out, on a call from a superior officer, simply because he would, in normal course, be off duty at the time; (2) if, when a constable is off duty, circumstances come to his notice demanding his intervention—e.g., the commission of a serious crime, where immediate action is essential in the interests of justice—his duty is at once to assert his powers and deal with the situation. The proper view, where a constable off duty does intervene, is that he asserts—not that he resumes—his character of constable. That character remains with him, as do his powers, throughout the twenty-four hours.

When is a policeman "in the execution of his duty"? This raises a separate question, not to be conclusively answered by determining whether, at the material time, he was on or off duty. A policeman who, while off duty, intervened to prevent a serious crime or to pursue or arrest the criminal or to investigate the circumstances or in any other way to exercise his police powers would be acting in the execution of his duty. On the other hand, the mere fact that a constable was in uniform would be insufficient. The case of *Monk v. Strathern*, 1921, J.C. 4, is in point. A constable in uniform on his way from his beat to his house at 11.20 p.m. saw five young men standing at the corner of a street, and said to them, "Are you not away to bed yet, boys?" As he was walking away one of the men threw at him a bottle which struck his head and inflicted a serious wound. This man was convicting of assaulting the constable "while engaged in the execution of his duty," in contravention of section 12 of the Prevention of Crimes Act, 1871. On appeal, the conviction was quashed.

Whether a constable is on or off duty, the real issue is—Was what he was doing within the four corners of the powers entrusted to him by the law of the land? If he chooses gratuitously to commit himself to a course of conduct not within the scope of his duties as a police officer or if, while purporting to carry out his legitimate duties, he exceeds his powers by some unwarranted interference, then he cannot be regarded as “in the execution of his duty.” Illustrations are found in the following cases:—*R. v. Crumpton*, 1880, 5 Q.B.D. 34 (constable assaulted while executing a warrant which was not “backed,” as it should have been); *Davis v. Lisle*, 1936, 2 K.B. 434 (constable assaulted while insisting on remaining in private premises, which he had entered without warrant or permission to make proper enquiries, after being emphatically directed by the occupier to leave); and, in the opposite sense, *Duncan v. Jones*, 1936, 1 K.B. 218; and *R. v. Roxburgh*, 1871, 12 Cox C.C. 8, in which it was held that, although a police officer may not be bound, in the execution of his duty, to assist the occupier of a house in putting out an intruder, yet he may lawfully do so and, if he sustains violence in so doing, the party inflicting such violence, though he may not be indictable for assaulting a police officer in the execution of his duty, will be liable to a conviction for an assault, as he cannot justify resistance to the force lawfully used to eject him.

#### CONTROL OF THE POLICE.

A measure of control, varying in its nature and extent, is exercised over each police force by (1) the chief constable, (2) the local authority—county or town council, as the case may be, (3) the sheriff, justices and magistrates, and (4) the Secretary of State for Scotland.

(1) The immediate executive control of each force is in the hands of the *chief constable*. His powers of appointment, dismissal, promotion and discipline have already been discussed. The disposal of the men and women under his command as local circumstances may require—where, when and how they are to work—is for his sole determination. He may allocate duties between department and department and fix upon particular officers responsibility for the due discharge of particular duties. He may, directly or through his immediate subordinates, issue orders of a general character or detailed instructions to meet a situation which has emerged.

(2) A more indirect control over the general policy and actings of the force is exercised by the *local authority*. As we have already seen, it is this authority which appoints the chief constable, may dismiss him, and determines the strength and the numbers of the

various ranks of the force. It allocates to the police premises for their use ; which, if suitable and adequate, will make for effective police work and, if cramped, out-of-date or badly sited, may make the use of modern technique difficult. It supplies, or withholds, equipment, and thus exercises a large measure of control over the introduction of up-to-date methods of communication (telephones, teleprinter, wireless), filing and crime detection. It will expect to be consulted when any fundamental departure is proposed—e.g., a change-over to the police-box system. Being responsible, in the first instance, for expenditure on police work, it has the power of the purse and, through that power, the means of promoting or hampering the efficiency of the force. With the backing of the local council, a vigorous and imaginative chief constable may make his force an effective agency for the maintenance of public order ; but where the authority proves obstructive or inadequate financial backing is withheld, his plans for effective policing may be largely checked or stultified.

(3) The control exercised by *the sheriff, justices and magistrates*, as the authorities responsible locally for the maintenance of public order, will be discussed in the next chapter.

(4) Finally, a very real, though more remote, control is exercised by *the Secretary of State for Scotland*, who is to be regarded as the official head and central co-ordinating authority of the Scottish police. This control flows naturally from the responsibility of the central executive (i.e., the Government of the day) to maintain order. "The administration of justice, the maintenance of order and the repression of crimes," said Lord Blackburn in *Coomber*, 9, A.C. 61, "are among the primary and inalienable functions of a constitutional government" ; and again, "I do not think it can be disputed that the administration of justice, both criminal and civil, and the preservation of order and prevention of crime by means of what is now called police, are among the most important functions of government, nor that, by the custom of this country, these functions do, of common right, belong to the Crown."

Apart from the special statutory powers entrusted to the Secretary of State, which are afternoted, he may bring pressure to bear upon police policy (1) through H.M. Inspector of Constabulary for Scotland, and (2) through the system of Government grants.

Power to appoint "one inspector to visit and inquire into the state and efficiency of the police appointed for every county and burgh, and also into the state of the police stations, charge rooms, cells or lock-ups and other premises occupied for the use of such police," was given by the Police (Scotland) Act, 1857, section 65. Payment of a government grant was made conditional upon the

issue by the Secretary of State of a certificate of efficiency. The procedure to be followed in the event of such certificate being withheld was altered by section 23 of the Local Government (Scotland) Act, 1889. This latter enactment was repealed in 1929 by the Local Government (Scotland) Act of that year, and it is now difficult to offer a confident opinion as to the effect of failure to issue a certificate.

The Government grant was at one time limited to a grant in aid of the cost of police pay and clothing. Later a grant in aid of police pensions was added. Since 1918 the Government grant has been 50 per cent. of all police expenditure approved by the Secretary of State, except in the case of certain items during the war, such as the pay of some classes of Police Auxiliaries, which have been borne wholly by the State.

The main special statutory powers of the Secretary of State are :—

The authorised establishment of the several ranks and any changes are subject to his approval. (Police (Scotland) Regulations, No. 5).

Every appointment to the post of chief constable is subject to his approval. (Regulation 9).

He is empowered to make Regulations "as to the government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of the members of all police forces." (Police Act, 1919).

He has the last word on the dismissal or severe punishment of any police officer, whatever his rank. (Police (Appeals) Act, 1927, as amended in 1943).

In the event of conflicting orders to a chief constable from the sheriff and justices, his decision is final. (Police (Scotland) Act, 1857, section 6).

Plans for station houses and lock-ups must be submitted to him. (1857 Act, section 55).

He may arrange, through the Privy Council, the terms of consolidation of forces upon application by a burgh authority. (1857 Act, section 63)

He has power to detach constables from burgh or county forces for any special or temporary duty or service elsewhere within Scotland; but only to the extent of ten per cent. of the force. (Burgh Police (Scotland) Act, 1892, section 83). See, meantime, the Defence (General) Regulations, 1939, No. 39.

During the present emergency, he has, under the Emergency Powers (Defence) Acts, 1939 and 1940, and the Defence (General) Regulations, drastic powers over the police. See Regulation 39 and the Defence (Amalgamation of Police Forces) Regulations, 1942.

### THE SPECIAL CONSTABULARY.

In modern practice, the appointment, control, powers, duties and conditions of service of the special constabulary are regulated by (1) sections 96 to 98 of the Burgh Police (Scotland) Act, 1892, as amended and extended; (2) the Special Constables (Scotland) Act, 1914; (3) the Special Constables Act, 1914; (4) the Special Constables Act, 1923; (5) various statutory regulations, of which the most important is the Special Constables (Scotland) Order, 1923, as amended; (6) the provisions to be found in local police Acts; and (7) temporary war-time legislation, such as Regulation 40 A.B. of the Defence (General) Regulations, 1939. These form a confusing and unsatisfactory mass of legislation by reference and codification in a single enactment is overdue. In brief summary, the effect of the legislation referred to is as undernoted.

*Appointment.* Special constables are appointed—(1) in burghs to which sections 96 to 98 of the Burgh Police (Scotland) Act, 1892, apply, by the magistrates; (2) in other burghs, in terms of the local acts; (3) in counties, by the county council, which now takes the place of the standing joint committee. In normal times, appointment is confined to persons of or exceeding the age of twenty years. During the present emergency, persons of or exceeding the age of eighteen years may be appointed. On appointment, a special constable is required to take an oath or make a declaration.

*Dismissal.* Section 96 of the Burgh Police (Scotland) Act, 1892, as amended and extended, allows the magistrates (or county council) to recall at pleasure an appointment as special constable. In local Acts, one may find a corresponding power. The Special Constables (Scotland) Order, 1940, provides that “the chief constable, or other person or authority under whose direction the special constable acts, may at his discretion determine the service of or suspend or dismiss any special constable.”

*Resignation.* A special constable may resign on giving to the chief constable (or other person or authority under whose direction he acts) notice of such period as may have been fixed by the police authority (or such other person or authority); provided that, if he has undertaken to serve as a special constable for any definite period, his resignation before the expiration of such period shall be subject to the consent of the chief constable. (Special Constables (Scotland) Order, 1940).

*Powers.* Special constables have “the same powers and privileges” as burgh or county constables, as the case may be.

*Control.* When on duty, special constables are under the direction of the chief constable, subject to a power reserved to the Secretary of State to place them, in exceptional circumstances,

under such authority as he may designate. Chief constables must keep a roll of the names and addresses of all special constables. The magistrates or county council, as the case may be, may make regulations for the organisation and training of the force. (In local acts, one may find some variation in these provisions).

*Employment.* A special constable may not be employed as such otherwise than for the purpose of aiding police constables on occasions of emergency and for suppressing or preventing tumult or riot.

*Conditions of Service.* Apart from whole-time special constables during the present emergency, who are paid a weekly wage, members of the special constabulary are unpaid ; but the police authority is empowered to pay out of the police fund " sums by way of (a) reimbursement of out-of-pocket expenses necessarily incurred in the execution of duty or an allowance in lieu thereof ; (b) an allowance in consideration of wages lost by a special constable while required for duty or during a period of temporary incapacitation for following his ordinary employment by infirmity of mind or body occasioned by an injury received in the execution of his duty without his own default or by illness contracted in the execution of his duty without his own default ; or (c) allowances in respect of such other matters as the Secretary of State may approve ; provided that any allowance so paid shall be of such amount and subject to such conditions as the Secretary of State may from time to time approve." Provision is further made for payment of a pension or gratuity in case of permanent incapacity occasioned by injury received or illness contracted by a special constable in the execution of his duty without his own default ; and, if death results, for payment to his widow of a pension or gratuity and to his children of allowances.

#### **Special Constables at Armament Depots, etc.**

The Special Constables Act, 1923, provides for the appointment as special constables within certain Naval, Army and Air Force establishments of persons nominated by the Admiralty, Army Council or Air Council. Special constables so appointed are under the exclusive control of the nominating department. (See Regulation 40, A.A., of the Defence (General) Regulations, 1939, for a temporary extension of this power).

#### **Additional Constables.**

(1) *Under the Police (Scotland) Act, 1857.* Section 7 of this Act authorises the chief constable of any county, with the approval of the sheriff or the justices, on the application of any person or persons, setting forth the necessity thereof, to appoint and cause

to be sworn in any additional number of constables, at any place within the limits of his authority, at the charge of the person or persons by whom the application is made, but subject to the orders of the chief constable and for such time as he shall think fit. Every such constable has the powers, privileges and duties of other constables appointed under the Act. The appointments are to be discontinued on fourteen days' notice in writing to the chief constable by the person or persons on whose application they were made.

(2) *Under the Police (Scotland) Amendment Act, 1858.* Section 2 of this Act authorises the sheriff of any county within whose jurisdiction the works of any railway, canal or other public work of a similar nature is in progress of construction, upon the application of the company or other parties carrying on such public work or of any two justices usually acting in the district, to direct the chief constable of such county to appoint such additional number of constables as the sheriff may think fit for the purpose of keeping the peace and for the security of persons and property against crimes and unlawful acts within the limits of such public works and within a mile therefrom. Such constables have all the powers, privileges and duties of county police. The wages and allowances of such constables are payable by the promoters of the works.

These powers have now little significance.

### THE RAILWAY POLICE.

Railway constables are appointed, in Scotland, under the terms of the London Midland and Scottish Railway Act, 1924, sections 57 and 58, or the North British Railway Act, 1901, section 48.

*Appointment.* L.M.S. constables are appointed by a sheriff or sheriff substitute on the application of the company. L.N.E.R. constables are appointed by the company; but the number acting at any one time within any county, city or burgh is not to exceed twenty without the consent of the local chief constable. On appointment, all railway constables make oath or declaration in due form of law before a sheriff or sheriff substitute. (As to the liability of the company for the actings of the railway police, see *Lambert*, 1909, 2 K.B. 776, and the comments thereon in *Fisher*, 1930, 2 K.B. 364).

*Dismissal.* L.M.S. constables may be dismissed either by the company or by a sheriff or sheriff substitute. L.N.E.R. constables may be dismissed only by the company.

*Powers.* A constable of the L.M.S. police has "all the powers, protection and privileges of a constable in respect of the exercise of his duties." He may act as a constable in, on or in the vicinity of the whole of the railway stations, works and undertakings of the

company in Scotland. He may follow and arrest any person who has committed in, on or in the vicinity of such railway stations, etc., any offence for which he might have been arrested while in, on or in the vicinity of the same; provided that no such powers are to be exercised outside the limits of the premises of the company except in regard to matters connected with or affecting the company or their undertaking. The general powers of a constable of the L.N.E.R. police are in very similar terms.

A railway constable must not act as such unless he is in uniform or provided with an authority granted by a sheriff. If not in uniform, he must show his authority whenever called upon to do so.

Constables of the L.M.S. police have special powers of search and arrest without warrant in respect of (1) persons in the employment or employed upon the property of the company, and (2) vessels, carts and carriages. These powers are detailed in section 58 of the Act of 1924, read along with the Third Schedule.

*Conferences.* The establishment of railway police conferences and of a Central Conference "for the whole of the railways of Great Britain" was directed by the Railways Act, 1921, section 67.

#### **DOCKS AND HARBOURS.**

The Harbours, Docks and Piers Clauses Act, 1847, provided machinery for the appointment of persons to act as constables within the limits of a harbour, dock or pier and a mile beyond.

In modern practice, the policing of the larger docks is usually effected either by the powers under a local Act or by an arrangement arrived at between the police authority and the dock authority.

#### **ROYAL PARKS AND GARDENS.**

The policing of Royal Parks and Gardens is provided for by the Parks Regulation Act, 1872. Within the limits of the park or garden of which he is keeper, every park-keeper has all such powers, privileges and immunities and is liable to all such duties and responsibilities as any police constable has within the police district in which such park is situated. (Section 8). Every police constable of the district has, within such park or garden, "the powers, privileges and immunities of a park-keeper" (section 8), which includes the special power of arrest without warrant conferred by section 5. The Act applies to all parks, gardens, recreation grounds, open spaces and other lands for the time being vested in, or under the control or management of, the Commissioners of Works. (Parks Regulation (Amendment) Act, 1926).

## CHAPTER II.

## WHAT IS A POLICEMAN ?

A POLICE OFFICER is :—

(1) *A man (or woman) appointed as a member of a police force, in the manner already described.*

As we have seen, the modern policeman is very much the creature of statute. His appointment and conditions of service are regulated, in great detail, by Act or Regulation. It is easy to underrate the importance of this direct legislative control ; yet, properly regarded, it is of tremendous constitutional significance.

In this country, there are no secret police ; no persons holding a direct commission from the central authority to spy upon private citizens in the interests of the party in power. True, there are regularly appointed police officers who, to conceal their identity and facilitate observation on suspects, do not wear uniform ; but the detective or plain clothes officer has no special powers or immunity denied to his uniformed colleague. In the eyes of the law, he is simply a policeman.

(2) *A public servant ; but neither a servant of the local authority, nor a servant of his chief, nor, in the full sense, a servant of the Crown.*

The nature of the relationship between the police and the local authorities has been the subject of judicial decision both in Scotland and in England—with the same result. In both countries, the courts have refused to subject the authorities to liability for wrongdoing by police officers, on the view that the relationship of master and servant does not exist and that the maxim *respondeat superior* does not apply. In Scotland, the leading cases are :— *Young v. Magistrates of Edinburgh*, 1891, 18 R. 825, in which the opinion was expressed that “the relation between the magistrates and the police is not a relation of employment but is an official relation constituted by statute ; the town council has no right to interfere with the police in the execution of their duties in relation to apprehension and detention of prisoners and therefore cannot be responsible for the negligent performance of these duties” ; *Girdwood v. Midlothian Standing Joint Committee*, 1894, 22 R. 11, in which it was held that the committee (the successor of the Police Committee) was “not entitled to interfere in any way with the police in the fulfilment of their duties” ; *Brown v. Edinburgh Magistrates*, 1907, S.C. 256 ; *Muir v. Burgh of Hamilton*, 1910, 1 S.L.T. 164, in which the matter was put thus—“The defenders have no power to appoint police constables or to dismiss them and they are therefore not the employers or masters of the individuals who

may be appointed by the chief constable nor answerable as such for their errors"; and *Simpson*, 1928, S.N. 30, in which Lord Constable concisely called attention to the "indirect and very limited character" of the control exercised over the police by the local authority. A similar line was taken by the English judges in *Fisher*, 1930, 46 T.L.R. 390. In Scotland, it has also been matter of express decision that a town council is not to be held liable in damages for a chief constable's delict. (*Innes*, 1889, 17 R. 11).

Nor is a constable the servant of his chief, who is not responsible for the wrongdoing of his subordinates unless the acts complained of have been directly ordered by him. (*Adamson v. Martin*, 1916, S.C. 319). But, although the strict relationship of master and servant may not exist, with all the legal implications which such a relationship entails, (1) a constable is the "agent" of his chief within the meaning of the Prevention of Corruption Act, 1906 (*Graham v. Hart*, 1908, S.C. (J.) 26), and (2) he is bound to carry out all lawful orders.

A police officer, then, is not the servant of the local authority. Is he a servant of the Crown? Both in Scotland and in England, judges have committed themselves to statements which suggest that he is. In *Girdwood (supra)*, Lord Kincairney referred to constables as "servants of the State with distinct duties imposed upon them by statute." In *Simpson (supra)*, Lord Constable described the police as "truly servants of the State." In *Fisher (supra)*, M'Cardie, J., spoke of the police officers who effected an arrest as "fulfilling their duties as public servants and officers of the Crown to preserve the peace"; and, in support of this view, he cited the passage in *Coomber*, 9 A.C. 61, referred to in the previous chapter.

These observations must be accepted with caution. They were, as lawyers say, *obiter dicta*—i.e., comments not strictly necessary for the determination of the point raised. When, in 1928, an attempt was made to take advantage of them to argue that, as a police officer was a Crown servant, his salary was not arrestable by his creditors, Lord Moncrieff rejected the argument. (*Young v. Turnbull*, 1928, S.N. 116). Clearly, a constable is not a Crown servant in the full sense in which that term may be applied to a civil servant or a member of the armed forces of the Crown. Except where a statute expressly grants him immunity, he is covered by its terms; a Crown servant is not, unless the statute goes out of its way to rope him in. (*Feist*, 1936, S.L.T. (Sh. Ct.) 122). He cannot—as, on occasion, a soldier may—shelter behind the orders of a superior. In every case, he faces the law alone, as an individual, and must accept the consequences of any excess or negligence in the exercise of his powers. In the English case of *Winter v.*

*Bancks*, 65, J.P. 468 (referred to in detail in chapter 13 at page 157), the court found a sergeant liable in damages although he was acting on instructions by telephone from an inspector ; but, somewhat inconsistently, refused damages against a constable by whose hands the wrongful act was done on the sergeant's instructions. In the Defence (General) Regulations, 1939, a clear distinction is repeatedly drawn between "a servant of His Majesty" and a constable.

What, then, is the true position ? Surely, that a policeman is a public servant—a person entrusted, by virtue of his appointment, with the due performance of duties in the interests of justice and of the community at large and, to this end, clothed with powers both at common law and under statute. It is in this capacity, as guardian of the common interests of the citizens, that he patrols the streets, watches over private and public property, does what he can to preserve life, directs traffic, keeps the streets free of danger and obstruction and open to their paramount use of passage for individuals going about their ordinary business or pleasure, keeps the peace and generally exerts himself to frustrate mischief and bring offenders to book.

Valuable services, constantly rendered and rarely acknowledged, are performed by the police in emergencies affecting individuals and property. A high percentage of the police are trained in first aid. In the event of serious accidents, the police will attend to the injured, see to their removal by ambulance and notify friends or relatives of any detained in hospital. In case of fire, they will summon the fire brigade, take all steps to save life, rouse persons asleep and in danger, do what they can to save property, and notify utility services (gas, electricity, water, etc.). In other emergencies, such as flooding, they will turn out and co-operate with the necessary services and take whatever steps may be called for in the public interest. As matter of daily routine, the police pass on, for attention by the appropriate departments, information of defective roadways or street lighting, escapes of gas, and a host of other matters affecting public safety and comfort. In the larger cities, immense service is rendered to the public by the Lost Property Departments of the various forces.

In addition, by long established practice, the police assume many lesser duties of public service. They may direct a stranger to his destination or advise him on the choice of a hotel or restaurant, or of the nearest post office, doctor, chemist's shop, or the like, or the most suitable conveyance ; retain keys ; take temporary charge of lost children ; provide over-night shelter for stranded persons ; escort the blind or elderly over a busy thoroughfare ; or look to the safety of children released from a city school.

Light is thrown on the nature of the duties of a policeman as a servant of the community at large by a number of legal decisions, of which it is sufficient to notice the following :—

(a) *Glasbrook Bros.*, 1925, A.C. 270, in which it was held that there was "an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime and for protecting property from criminal injury," and that "the public who pay for this protection through the rates and taxes, cannot lawfully be called upon to make further payment for that which is their right"; but in which the court approved of the recognised practice of "lending" the service of constables for payment to an individual who requires special protection for his property either generally or on a particular occasion. So the promoters of an athletic meeting or boxing contest or race meeting or the like may be called upon to pay for the attendance of police officers in the grounds at their request. So to employ the reserve strength of a police force, so long as it is not required on ordinary duties, is an advantage both to the promoters of such gatherings and to the ratepayers.

(b) A constable on duty inside a police station in a busy street, at a time when there were a large number of persons, including children, in the street, saw two runaway horses, attached to a van which had been left unattended, bolting down the street. He rushed out and eventually stopped the horses, sustaining injuries in respect of which he sued the van driver's employers. His right of action was upheld and the plea of *volenti non fit injuria* held not to apply. "It is true," said one of the judges, "that he was under no positive duty to run into the street. . . . It is also true that the primary duty of the police is the prevention of crime and the arrest of criminals. But this is only part of the duties of the police in London. There is a general duty to protect the life and property of the inhabitants. There is a discretionary duty to help blind and infirm people to cross the road and to direct people who have lost their way. . . . The police are now regarded as the friends of the inhabitants while engaged in lawful avocations. In my opinion, they are not mere lookers-on when an accident takes place. They have, I think, a discretionary duty to prevent an accident arising from the presence of uncontrolled forces in the street if they are in a position to do so." (*Haynes v. Harwood*, 1935, 1 K.B. 146).

(c) In *Fowler v. Hodge*, 1896, 2 Adam 209, the High Court of Justiciary upheld a conviction of assault on a constable "while in the execution of his duty" in the following circumstances. In connection with an entertainment in a hall in High Street, North

Berwick, the police, to prevent obstruction, gave intimation that all vehicles approaching the hall must do so in single line. A cab driver, who had been directed to the rear of the queue, became impatient and drove out of the line and rapidly up the street towards the hall, whipping his horse. A constable called upon him to stop and, when he paid no heed, caught the horse by the head. The cabman struck the constable repeatedly with his whip. "It is quite a new proposition to me," said the Lord Justice-Clerk, "that when a street is likely to be blocked by traffic the police constable on duty is not entitled in the execution of his duty to do his best to regulate the traffic. If he did not do this, he would fail in his duty," and he added that this was to be done "for the benefit of the community." Lord Kincairney said: "It is the right of all policemen to keep the streets clear and to act in such emergencies as this." The case of *M' Ara v. Edinburgh Magistrates*, 1913, S.C. 1059, may also be consulted.

(d) On the occasion of the opening of the Glasgow Exhibition, on 3rd May, 1901, by the Duke and Duchess of Fife, a superintendent of police was endeavouring to keep clear a short street leading to St. Enoch Station. With a number of other officers he proceeded to clear the pavement. A certain Mr. Mason, who occupied business premises with a back entrance in the street in question, protested, insisting that his employees had a right to stand on the pavement; whereupon (according to Mr. Mason's averments in a subsequent action of damages against the superintendent) he was roughly handled, hustled and pushed violently down the three steps giving access to his premises. These averments were held to be insufficient to support the action of damages. "It is often necessary," said Lord M'Laren, "that the members of the police establishment, in the discharge of their duty, should use force, it may be, to protect individuals who are being wronged or to keep order in the streets. The police are entitled to use force when necessary in the discharge of their duties, and it would be a very inefficient police officer who should confine himself to speaking to people and leaving them alone if they refuse to obey orders. To make a relevant case of assault on the part of a police officer on duty, it appears to me that it is necessary to aver either (1) that the order which the officer was seeking to enforce was unlawful—that is, not within the scope of his duty, or (2) that the pursuer was willing to comply with the order, in which case the use of force would be unnecessary, or (3) that the force used was manifestly in excess of the requirements of the case . . . . The magistrates are entitled to make use of the police force to keep the streets clear, and it is in the exercise of their discretion to give such orders through the police as they think fit for ensuring safety

and good order." There was no averment by the pursuer that a baton was used or that he was struck or injured, or, indeed, of any separate or individual assault. No doubt there was hustling and pushing, but "I do not see," said Lord M'Laren, "how a street can be cleared except by hustling and pushing the people who refuse to move," and he added that it was, of course, impossible for a policeman to measure the force used so precisely that he could know whether any individual in the crowd was pushed down one, two or three steps as a result of his effort. The action was dismissed. (*Mason v. Orr*, 1901, 4 F. 220.)

(3) *A person subject to a special disciplinary code.* As a soldier is subject to martial law—i.e., to a special body of law which does not apply to the ordinary citizen and is administered in specially constituted courts—so a policeman falls under the special disciplinary provisions of the Police (Scotland) Regulations. As we have seen, this is administered by the chief constable, subject to a right of appeal.

(4) *A member of the community*, still subject, notwithstanding his appointment, to the ordinary law of the land and to the ordinary processes of law.

In Scotland, we have no *droit administratif*. A constable who, whether at the time he is on or off duty, in uniform or in plain clothes, commits a crime or offence punishable at common law or under statute may be prosecuted. The prosecution is raised in precisely the same manner, and takes the same course, as in the case of the private citizen. So a policeman may appear before the local police court charged with theft or before the High Court charged with murder. It may be added that a criminal court before which a policeman is charged with a crime or offence may properly regard as an aggravation the fact that accused is a person whose duty it is to prevent crime, and impose an exemplary sentence. (*C. v. H.M. Advocate*, decided by the High Court on appeal in 1941). Cases may occur where the actions of a constable lay him open both to a charge under the Discipline Code and to a charge of a criminal offence. In such event, the usual practice is for the chief constable to dispose of the case by disciplinary proceedings, where the crime or offence is relatively trivial and no one outside the police force is affected by the constable's wrong doing. When the crime or offence is a serious one, and in all cases where it has been committed against the person or property of anyone outside the Police Service, the matter is reported to the appropriate prosecutor. If criminal proceedings are instituted and a conviction results, disciplinary proceedings normally follow in respect of the breach of the Police Discipline Code which has been established by the Court conviction.

Equally, a constable may be sued for damages in a civil court, whether his delict be committed when on duty or in his capacity as a private citizen.

A police officer lives a normal life as a citizen. Apart from the disabilities already noted, there is no restriction on his activities. He may mix with his fellow citizens at will. In Scotland, only about 200 young unmarried constables are accommodated in barracks—and this mainly in county areas. Barracks are used for reasons of convenience and training. A contrast may be made with Northern Ireland, where the police are a semi-military body, living in barracks and set apart from the general body of the community. In normal times, the Scottish police do not carry firearms, and even in war-time firearms are carried only by men employed on special duties.

In recent years, closer contacts between police and public have been encouraged. The development among the police of civilian activities—concert parties, athletic teams, and the like—has done much to improve the relations of the police to the ordinary citizen. In connection with Civil Defence, persons from every walk of life have dealt with police officers on a level of equality. Charities promoted and run by the police have served to underline the position of the police as the servants and friends of law-abiding members of the public. In certain English cities (notably Norwich, Swansea and Hull) the police have devoted much time and initiative to the organisation and running of boys' clubs, with excellent results. While this volume was in the press, the first boys' club was instituted by "Z" Division (Croydon), in the Metropolitan area. So far, there is no such club in Scotland.

(5) *A servant of justice* and the "hand" of the authorities charged with the duty of maintaining public order.

The sheriff, justices and magistrates all have a responsibility to see to the maintenance of public order. It is therefore not surprising to find that the legislature has entrusted to them a measure of control over the police. The relevant provisions are found—

(a) In the Police (Scotland) Act, 1857, which enacts that the chief constable is to have "the general disposition and government of all the constables," but that this is to be "subject to such lawful orders as he may receive from the Sheriff or from the Justices of the Peace in General or Quarter Sessions assembled" (section 6); that "the constables acting under this Act shall, in addition to their ordinary duties, perform all such duties connected with the police in their respective counties as the Sheriff or the Justices of the Peace of the county may from time to time direct and require" (section 15); and that the chief constable, when so required, must make

reports to the Police Committee, the Sheriff, the Justices and the Magistrates of burghs forming part of a county, "and shall obey all lawful orders and warrants of the Sheriff and Justices in the execution of his duty" (section 26).

(b) In the Police (Scotland) Amendment Act, 1858, where power is given to the Sheriff in certain circumstances to direct the chief constable to appoint additional constables to keep the peace and protect persons and property in the neighbourhood of public works in course of construction.

(c) In the Burgh Police (Scotland) Act, 1892, where it is provided that "the chief constable and constables shall obey the orders of the magistrates and at all times afford their aid and assistance to the magistrates . . . in all matters relating to the preservation of peace and good order, the suppression of nuisances and the removal of obstructions within the burgh" (section 86); and that on the requisition of the sheriff of any county or chief magistrate of any burgh the chief constable shall detach constables to act elsewhere (see section 83).

(d) In the Burgh Police (Scotland) Act, 1892, section 494, a limited power is given to the magistrates to direct a chief constable (of a burgh to which the Act applies) to dismiss any constable whose conduct in proceedings before a magistrate has been unsatisfactory. This power has, so far as the writer knows, never been exercised. A corresponding enactment in Edinburgh was allowed to lapse on the consolidation of the local police Acts in 1933. In *M'Kay v. Cogan*, 1834, 13 S. 164, a common law right in the magistrates to dismiss police officers was asserted, and it was stressed that the magistrates of a burgh have an inherent right to control all officers for preservation of the peace within the burgh.

In one respect, the control exercised by the sheriff and justices over the county police would appear to have diminished. When, in 1857, counties were directed to appoint Police Committees, it was expressly provided that the Lord Lieutenant, the Sheriff and the chief magistrates of certain burghs were to be members of the committee. (1857 Act, section 2 and section 73). In 1889, by the Local Government (Scotland) Act of that year, the powers of the Police Committee were transferred to the newly created Standing Joint Committee, of which the Sheriff was to be an *ex officio* member. (Section 18). In 1929, by the Local Government (Scotland) Act of that year, section 18 of the Act of 1889 was repealed, the standing joint committees were dissolved and their functions as the police authority transferred to the county council. No mention was made of the Sheriff, Lord Lieutenant or Magistrates, whose powers in this regard would appear to have lapsed.

The case of *Beaton v. Ivory*, 1887, 14 R. 1057, underlines the determination of the courts to afford a high degree of protection to a sheriff who, in circumstances of emergency, takes steps to maintain the peace of the county, and uses the police to that end.

The case of *M' Ara v. Edinburgh Magistrates*, 1913, S.C. 1059, illustrates the manner in which the police, acting as the "hands" of the magistrates of a city, may move on persons causing an obstruction in a public street. This power is carefully to be distinguished from the right of arrest in cases where an actual breach of the peace has been committed. The case of *Mason v. Orr* (see page 28) is also in point.

The nature of the relationship of the police and the authorities charged with the maintenance of public order was pointedly raised when, in 1895, a chief constable sought to dictate to the criminal authorities on matters of procedure, maintaining that cases reported by him to a particular prosecutor must be carried to an issue by that prosecutor and no other—i.e., that it was for him to determine which cases should be tried in the J.P. and which in the Sheriff Court. To this end, he raised an action of declarator in the Court of Session. The declarator was refused. "Who is the chief constable," asked one of the judges, "to whose behests sheriffs, justices and the Lord Advocate are to bow and whose edicts are to be ratified by the decree of this court? By the Police (Scotland) Act, 1857, the duty is laid on each county of equipping a disciplined police force, of which the chief constable is the commanding officer. The force thus equipped is placed, along with its commanding officer as an integral part of it, at the disposal of the authorities charged with the preservation of the peace and the prosecution of crimes, and, to make matters perfectly clear, the chief constable is, by the 26th section, directed to obey all lawful orders and warrants of the sheriff and justices in the execution of his duty." (*Dumfries County Council v. Phyn*, 22 R. 538).

One further point may be noted. Normally, when investigating circumstances which point to the commission of a crime or offence, the police act on their own initiative and exercise an unfettered discretion. It is, however, quite proper that the Procurator-Fiscal should, either at the outset or at a later stage in the enquiry, virtually take command of the investigation and that the police should act under his instructions and consult him before taking a definitive step. To do so may be greatly to the advantage of the officers in charge of the case—see *Watson v. Muir*, 1938, J.C. 181, in which, after a road accident involving a motor car and a pedal cycle, the police, on the instructions of the Procurator-Fiscal, stopped repairs to the car, instructed the garage proprietor to hold

it at their disposal, and later removed the car and tested the brakes. An objection to the leading of evidence of the result of the test failed.

(6) *A person with special powers*—i.e., entrusted with powers denied to the private citizen.

Admittedly, the ordinary citizen may, on occasion, resort to drastic action against a wrongdoer, taking the law into his own hands. On witnessing the commission of a serious crime, he may at once arrest the offender, but (unlike the policeman) he may not act upon suspicion, however strong, or upon information, however credible. (*Alison* (vol. 2, page 119) attributes to the aggrieved party a power to act upon information from bystanders. This view has been doubted—see Macdonald's *Criminal Law*, 4th edition, page 289, footnote—but it finds some support in Lord McLaren's opinion in *Lundie*, 21 R., at 1090, which gives the injured party a right to act on “such evidence as is equivalent to personal observation.”) Moreover, he takes the risk of his eyes deceiving him and must pay for a mistake. (*Walters*, 1914, 1 K.B. 595). He has no power to break open doors and, in cases of mere breach of the peace, is limited to such action as will serve to end the disturbance.

In England, the private citizen has greater powers. A few Acts of Parliament give special powers *civis ex populo* (i.e., to “Tom, Dick and Harry”—e.g., *Coinage Offences Act, 1936*, section 11. Where a statutory contravention has been committed, the aggrieved party has no power of arrest other than that conferred by the statute. (*Lundie*, 21 R. 1085). Others give special powers to citizens acting in a special capacity (e.g., pawnbrokers) or holding special appointments (immigration officers, inland revenue officers, park keepers in Royal Parks, and the like).

These limited and partial powers are, however, insignificant alongside the many and varied powers possessed by the police at common law or conferred upon them by statute.

It is, however, important to realise that a policeman is not a person who can do just what he likes. He has no general licence to interfere with personal liberty or invade privacy. At any moment, his actions may be challenged in a court of law, when it will be no answer for him to say “But I'm a policeman.” He must justify his interference by chapter and verse, pointing either to a common law power acknowledged by the authorities or to an express direction in some Act of Parliament.

### CHAPTER III.

#### WHAT MAY A POLICEMAN DO ?

In the further chapters, it is proposed to examine in detail the powers conferred upon the police at common law or under statute. The present chapter is devoted to certain general considerations. For convenient reference, a catalogue of police powers, in bare outline and without elaboration, is appended.

##### **Common Law and Statute Law.**

In subsequent pages, the phrase "at common law" will frequently occur. What does it mean?

The common law is the law of the land apart altogether from Act of Parliament. It is the customary law which has grown up through the centuries. It is to be sought in the writings of the commentators (Hume, Alison, Macdonald and other recognised authorities) and in the Law Reports, which record the decisions of our civil and criminal courts.

The statute law consists of all enactments made by, or by direct authority of, Parliament. It is to be sought in the Acts of Parliament, general or local, which apply to Scotland, and in the Orders, Rules, Regulations and Bye-Laws made thereunder. For our present purpose, such enactments are of consequence in so far as they create offences, prescribe penalties, make provision for enforcement of their terms, and confer upon the police express powers of arrest, search, seizure, examination of records, and the like.

To illustrate the distinction—It is by virtue of the common law that a constable may arrest without warrant a person whom he sees committing a crime; but his power so to arrest a "drunk and incapable" is purely statutory, being found in the Licensing (Scotland) Act, 1903, section 70.

In this volume, the word "crime" is used to denote a violation of the common law; breaches of statutory enactments are referred to as "offences" or "statutory contraventions."

##### **Powers and Duties.**

A further consideration emerges. Do the powers entrusted to the police coincide with the duties demanded of them? Can it be argued that where it is the duty of a policeman to cope with a situation confronting him he necessarily possesses adequate power to do so?

In the writer's opinion, a distinction is to be drawn between common law and statutory duties. In the former case, the existence of a clear duty would seem to involve the possession of power to perform the duty. This view is supported by the reasoning of the judges in such cases as *Costello v. Macpherson*, 1922, J.C. 9, in which the right of the police to put questions to a suspect was upheld "because if policemen are not entitled to make enquiries when they believe that a crime has been committed, the due discharge of their duties would be seriously hampered"; and *Adair v. M'Garry*, 1933, J.C. 72, in which a full bench asserted the power of the Scottish police to fingerprint a person arrested on a criminal charge on the ground that "the police must be armed with all adequate and reasonable powers for the investigation and detection of crime." But, in asserting these powers, the police must have a sense of proportion. The authorities do not sanction any drastic invasion of personal liberty out of all proportion to the purpose to be served; nor do they excuse the use of unfair methods (*Blaikie v. Linton*, 18 S.L.R. 583).

When, on the other hand, a statute lays upon the police the duty of administering its terms—as it does, by implication, when it creates an offence but makes no special provision for enforcement and investigation—greater caution must be exercised. The police may still employ "all lawful methods of detection" (*Southern Bowling Club v. Ross*, 1902, 4 F. 405), but must not assume special powers—such as a right of arrest or search. A constable, in such case, cannot go beyond the powers expressly given him by the statute contravened, and it will be no answer for him to say that otherwise the purposes of the Act would be frustrated. For a possible exception, see chapter 8, page 73.

#### **How far is a Policeman protected by the Law?**

A police officer, as has already been noted, is subject to the ordinary processes of law. If he commits a crime, he may be prosecuted. If he wrongs his neighbour, he may be sued. But "it is of the highest importance that public officials should not be hindered in their duty by fears of incurring liability for damages if their conduct is subsequently impugned as indiscreet or imprudent or going beyond what the immediate necessities required" (per the Lord President in *Robertson v. Keith*, 1936, S.C. 29). The courts will exert themselves to protect police officers so long as (1) they are acting within their competence—i.e., engaged upon a duty clearly within the four corners of the powers entrusted to them by the common law or expressly conferred upon them by statute; and (2) they have not acted maliciously or without probable cause. Moreover, the presumption is that a police officer acts in pursuance of his duty and it is for the party aggrieved

by his interference to rebut that presumption (per Lord Salvesen in *Shields v. Shearer*, 1913, S.C. 1012; approved by the House of Lords—1914, S.C. (H.L.) 33). This he may do by showing either that, a warrant being a necessary preliminary, no warrant was obtained or that the constable's powers were grossly exceeded or abused (per Lord Hunter in *Robertson v. Keith* supra).

Good faith, then, is normally enough—but not always. Where the course of conduct to which a police officer has committed himself is not justified either by the common law or by statute, his honest belief that he was acting properly will not protect him. The cases of *Shields v. Shearer* supra and *Harvey v. Sturgeon*, 1912, S.C. 974, both of which turned upon the true construction to be given to section 88 of the Glasgow Police Act, 1866, afford excellent illustrations. In these cases, the court held that the police were not the final judges of whether a person was "reasonably suspected" of having committed a penal offence. The reasonableness of their conduct was a matter for the jury and did not depend entirely upon the *bona fides* of the defenders. "An arrest, in the absence of well-founded suspicion and without a warrant, is a patent irregularity and wholly unprivileged. In such circumstances it is unnecessary that malice and probable cause should be inserted in the issue." (*Glegg on Reparation*, 3rd edition, page 185).

#### **Powers to certain Officers only.**

In the normal case, special powers are given to "any constable"—i.e., to any and every police officer, irrespective of his rank. To this one finds a few exceptions, in which the special power is entrusted only to the higher ranks. Examples are to be found in the Official Secrets Act, 1920, section 6; Licensing (Scotland) Act, 1903, section 95; Fire Brigades Act, 1938, section 14; and elsewhere.

Normally, also, special powers conferred by statute are given to all persons entitled to assert police powers in the particular locality to which the Act applies. An exception is found in the Glasgow Police Act, 1866, section 88—"it shall be lawful for the chief constable or for any superintendent, lieutenant or constable *acting under or appointed by him to . . .*" Thus, although officers of the Lanarkshire County Constabulary may assert ordinary police powers within the City of Glasgow (Police (Scotland) Act, 1857, section 11), they cannot take advantage of these special powers. *Per contra*, all constables of county forces may, in the writer's opinion, take advantage, within burghs situated wholly or in part in their counties, of the special powers contained in the Burgh Police (Scotland) Act, 1892, for such powers are given to "any police constable"—i.e., to any police officer having powers within the burgh concerned. (See, as illustrative, section 467).

### Territorial Limits of Police Powers.

A police officer must be careful to exercise his normal powers only within his territory—which may, however, extend beyond the county or burgh in which he serves—see the Police (Scotland) Act, 1857, section 11, and the Burgh Police (Scotland) Act, 1892, section 80. In 1908, two detective officers of the Glasgow City Police were held liable in damages in respect of the arrest without warrant outside Glasgow of a person who, having been brought by them into the city, was convicted of the crime for which they had arrested her. (*M'Crae*, 1908, 25 Sh. Ct., Rev. 230).

Keeping these general considerations in view—

#### **A Police Officer may—**

- (1) Take all reasonable and necessary steps to protect life and property, to control traffic and to keep streets free from danger and obstruction. These powers have already been touched upon.
- (2) Undertake discretionary duties as a friend and servant of law-abiding members of the community—see the previous chapter.
- (3) Carry out special instructions issued by those responsible for the maintenance of public order and by the criminal authorities, as already explained.
- (4) Maintain order and prevent crime—see chapter 4.
- (5) Investigate suspicious circumstances, using “all lawful methods of detection”—see chapters 5 to 7.
- (6) Arrest (a) without warrant, (b) upon warrant—see chapter 8.
- (7) Search (a) persons, (b) premises—see (a) chapter 9, (b) chapter 12.
- (8) Assist in the administration of justice through the machinery of the criminal courts—see chapter 11.
- (9) Trespass upon private property and enter premises in the circumstances later explained—see chapter 12.
- (10) Break open doors in the circumstances later explained—see chapter 12.
- (11) Seize, receive and deal with articles of private property to the extent explained in chapter 13.
- (12) Exercise the many and varied special powers conferred by statute—see chapter 14.

## CHAPTER IV.

THE PREVENTION OF CRIME AND  
MAINTENANCE OF ORDER.

THE first duty of a police officer is to prevent crime and to maintain unbroken the public peace. This he may do in a variety of ways—not only by active intervention in the early stages of a course of conduct pointing to an ultimate violation of the law, but even more by the scrupulous and diligent performance of his ordinary duties of patrolling the streets, keeping them clear of obstructive or rowdy elements, “testing” doors, calling the attention of those concerned to unguarded means of access to property, remarking unusual occurrences and keeping a watchful eye upon suspicious persons. Apart from such diligent performance of routine duties, special steps may be taken. In one English city, bicycle thefts have been more than halved by the institution of a voluntary register of bicycle frame numbers.

The duty of the police to intervene where conduct in a public place seems likely to lead to some breach of the public peace is admirably set out in the case of *M' Ara v. Edinburgh Magistrates*, 1910, S.C. 1059. “The magistrates, as the proper conservators of the streets,” said the Lord President, “have got to consider two things—first, whether what is going on in the streets is at all likely to interfere with what I have said is the paramount use of the streets—the right of passage; and, secondly, whether what is going on is likely to lead to a breach of the peace. In either of those cases it seems to me that they have an absolute right *via facti* by means of the police to move on the people who are causing the obstruction. . . . I also think if they find a person speaking in such a way as is calculated to incite other persons to commit a breach of the peace they have a right to move him on.” (Note that the right conceded by this judgment is something less than a right of arrest).

Nor is this power to intervene confined to public places. In *Reg. v. Prebble*, 1 F. & F. 325, an English court held that a constable, in clearing licensed premises of persons therein, was not acting in the execution of his duty, but “it would have been otherwise had there been a nuisance or disturbance of the peace or any danger of a breach of the peace.”

The duty to intervene to prevent the development of a breach of the peace frequently arises in connection with the holding of public meetings either on the street or in private premises hired for the occasion. In assessing the likelihood of trouble, the police are entitled to have regard to disturbances which have previously arisen from meetings held under the same auspices. In *Duncan v. Jones*, 1936, 1 K.B. 218, when a woman was about to address a number of persons in a street a police inspector, who, because of previous happenings, reasonably anticipated that a breach of the peace might occur if the meeting proceeded, forbade her to do so. She persisted and obstructed the officer in his attempts to prevent her. The appeal court held that she had rightly been convicted of obstructing the police while in the execution of their duty. The earlier decision of *Thomas v. Sawkins*, 1935, 2 K.B. 249, related to a meeting held, under Communist auspices, in a private hall hired for the occasion. The meeting was extensively advertised; the public were invited and no charge was made for admission. Police officers who presented themselves at the hall were refused admission, but insisted upon entering and remaining throughout the meeting. No breach of the peace or disorder or other offence was actually committed, but the police had (again because of previous experiences) reasonable ground for believing that, if they were not present, seditious speeches would be made and incitements to violence and breach of the peace would occur. On appeal, it was held that the police were within their rights in entering and remaining on the premises.

In acting so as to anticipate and prevent crime or public disorder, the police may use such force as the circumstances demand. They may commit technical assaults.

A woman walked at mid-day along the main street of a small Irish town wearing a party emblem, the wearing of which "was calculated and tended to provoke animosity." Several persons followed after and threatened her. A sub-inspector of the local constabulary requested her to remove the emblem. She refused. The officer then gently and quietly removed it. An Irish Divisional Court held that the officer had a good defence in law to an action of damages for assault. (*Humphreys v. Connor*, 1864, 17 Ir. C.L.R. 1). This decision was recently approved in *Connor v. Pearson*, 1921, 2 I.R. 66—"a police officer or a magistrate may, in the presence of imminent danger, commit what would otherwise be an assault in order to prevent a breach of the peace."

The disorder, however, must be imminent. The police are not within their rights in restraining the action, or interfering with the liberty of an individual merely on their opinion of some prospective but remote danger. "There is absolutely no authority

for the proposition that if a police officer believes that a person's life would be in danger if he returned to his own home the officer is entitled to detain the person by force." An innocent person thought to be in danger at the hands of wrongdoers cannot be taken into custody for his own protection. (*Connor v. Pearson* supra).

On the other hand, the fact that a person who had committed an offence was in danger of attack by a hostile crowd might properly influence the police to arrest him instead of proceeding by summons.

It is instructive to note that, as in Scotland in M'Ara's case, the English and Irish courts speak of the power of the police to intervene to prevent crime or breach of the peace as flowing from the duty of justices or magistrates to maintain order. (See *Reg. v. Queen's Co. J.J.*, 1882, 10 L.R. Ir. 301, approved in *Thomas v. Sawkins*, supra). The Irish case of *O'Kelly v. Harvey*, 1883, 14 L.R. Ir. 105, was, indeed, concerned with preventive action taken by a Justice who had dispersed a meeting in the honest belief (which the facts supported) that its continuance would lead to disorder. Approving of his action, the appeal court held that the Justice was not bound to defer action until a breach of the peace had actually been committed. "His paramount duty was to preserve the peace unbroken."

In the opinion of the present writer, the English and Irish decisions referred to are in line with the attitude evinced by our Scottish judges and may safely be accepted. It is, however, doubtful if the High Court of Justiciary would accept the dictum of Justice Avory in *Thomas v. Sawkins* that a constable may break in to prevent an affray which he has cause to suspect may take place on private premises.

Some indication of the extent to which the Scottish courts are prepared to go in protecting police officers who resort to drastic action in the interests of public order is given by the cases of *Brown v. Murray*, 1874, 1 R. 776, and *Wallace v. Mooney*, 1885, 12 R. 710.

The first was an action brought by John Brown, stationer, Kelso, against (1) a Mrs. Murray ; (2) her manager, McCall ; and (3) John Moscrip, the local police superintendent. The facts, in brief summary, were that Mrs. Murray had been commissioned by the managers of Kelso races to print an official race card, which was revised by the clerk of the course ; that Brown printed another card, which was neither accurate nor complete ; that a hawker named Craig bought a dozen of these cards and proceeded to vend them in the market place ; that, on these facts coming to

Mrs. Murray's notice, she sent her manager, McCall, to complain to the police; that McCall, along with the police superintendent, challenged Craig, who at first refused to reveal the source of his supply; that in the market place members of a crowd were complaining that they had "been done" and demanding their money back from Craig; that Craig was taken to the police station, but whether under arrest or by moral suasion was not clear; that he then offered to take the police to Brown's shop, and did so; that McCall and Moscrip remonstrated in strong terms with Brown, but without actual threat of proceedings or imprisonment; and that Brown, under pressure, paid back Craig and two other hawkers and stopped further sales. On these facts, the Sheriff-Substitute threw out the action; the Sheriff-Principal reversed his judgment; and the Court of Session, agreeing with the original finding, held that Brown had no cause of action. Lord Neaves said—"As regards the Superintendent of Police, while I may not entirely approve of his conduct, I cannot forget that great sympathy is due to an officer charged with the peace of a burgh on an occasion when it is notorious that excitement is likely to prevail, the pursuer obtaining money from the lieges for incorrect cards being a natural source of irritation. It is not every error of judgment, *particularly in relation to a precautionary act*, that will make a police officer liable in damages." The following passage in the judgment of the Lord Justice-Clerk is instructive—"I am not of opinion that if there had been no ground for apprehending any public disturbance, the mere breach of Mrs. Murray's privilege would have justified the interference of the Superintendent. But . . . it was not a mere private matter. Everyone knows that where a large crowd is collected for purposes of sport and betting is going on to a large extent the circulation of false news is calculated to produce excitement. Moscrip was quite entitled to go to the shop and suggest in strong terms that the sale of the cards had better be given up."

The second case was an action for assault and slander raised by Wallace against a police constable. Wallace had paid for admission to the paddock at Paisley races. He was forcibly removed by the constable, who was on duty with instructions to remove bad characters from the enclosure. While doing so, the constable remarked to a colleague, who had come to his assistance, that Wallace was "a resetter from Glasgow." In point of fact, Wallace had at no time been convicted of reset; but he had been convicted of theft more than once and was reputed a resetter by the Glasgow police. The Court of Session held that the instructions were lawful and that there had been neither assault nor slander. "The paddock," said one of the judges, "was not intended for those whose presence might be a source of danger

to property or order. . . . There was an implied condition attaching to his right of entry that his character was such as warranted his presence in the enclosure."

While the police have power to anticipate and prevent the commission of a crime, it is a question of circumstances whether they are in duty bound to do so. Certainly they ought to intervene whenever it has become clear that serious disturbance of the public peace or serious injury to an individual or extensive damage to property may otherwise result. It is, however, quite proper, where no serious result is likely to follow, for a police officer who suspects, or is aware of, the intended commission of a crime, to lie in wait in a place of concealment, watch the sequence of events and, when the crime has been carried to completion, leave his hiding place and pounce upon the offender. (Macdonald's Criminal Law, 4th edition, page 26).

## CHAPTER V.

THE DETECTION AND INVESTIGATION OF  
CRIME.

EXCEPT in those comparatively rare cases in which statute has laid upon others the duty of detecting and investigating contraventions of the law, that duty rests with the police. The word "detection" is here used to denote (1) enquiry into suspicious circumstances pointing to the commission of some crime or offence, whether such circumstances have come to the notice of the police by observation in course of routine patrol or have been pointedly brought to their notice by a complainant or informant, and (2) periodical "sweeps of the net" undertaken to discover whether the law is being observed—e.g., routine visits to licensed premises or examination of brokers' books. The word "investigation" is used in a narrower sense—to cover police action once it has been determined, with fair certainty, that a crime or offence has been committed. In "detection," the question is—Has the law been broken? In "investigation," it is—Who is responsible? In practice, "detection" and "investigation" overlap; but, though the distinction may be artificial, it is helpful in exposition. Speaking generally, detection is the work of the man on the beat or the plain-clothes officer; investigation is (in the larger cities) the province of the specialist—the detective or finger-print expert or photographer. It is, however, well to keep in mind that members of the C.I.D. have no special powers or immunities. In the eyes of the law they are simply policemen. On occasion, commendable detective ingenuity is displayed by the uniformed officer, although the credit is apt to go to the detective who takes over the later stages of the enquiry.

"The blood and bones of all practical detective work," wrote one of the most consistently successful detective officers of our time, "is information. This is got in a variety of ways, but the simplest is from informants." Officers of experience know that information of value may come from unlikely or tainted sources, that informants (often anonymous) are actuated by the most improbable motives, and that it is unwise to leave unsifted any suggestion of crime.

In both detection and investigation, the police officer may be called upon to exercise a wide diversity of technique—to note any unusual occurrence, the movements of persons already under suspicion, abnormal traffic to premises (or normal traffic at

abnormal times), and so on ; to test, by careful and exhaustive personal enquiries, information received ; to circulate information ; to keep and consult records ; to keep patient watch, it may be for days on end, on a suspected place ; to organise a raid, selecting a propitious moment likely to yield results ; to shadow an individual over a period of hours, with attention never for a moment relaxed ; to trace witnesses ; to ask questions ; to examine microscopically the *locus* of a crime ; to resort to disguise ; to take photographs or films ; to stage a fictitious situation or set a trap ; to seize "productions" ; to search premises ; to act promptly so as to prevent the destruction of incriminating evidence ; to invoke the aid of the expert. No limit can be set to detective activity.

#### **"All Lawful Methods of Detection."**

The executive members of a private club raised an action against the Chief Constable of Edinburgh and a sergeant of the City Police asking for a declarator that it was illegal for members of the local police force to enter the club in disguise in order to discover whether shebeening (the sale of intoxicating liquor without a certificate) was being practised in the club. The action failed. "I am not aware," said the judge before whom the action was raised, "of any judicial dictum as to the limits of the devices to which the detective police force may resort in their pursuit of crime. I am not prepared to lay down in the form of a declarator any general proposition on the subject." His judgment was approved by the Inner House of the Court of Session. The following passage from the opinion of Lord Young is instructive—"By the law of Scotland lawful practices may be resorted to in the public interest in order to detect people who are in the way of committing offences, and if the police of Edinburgh or of any other town think that the law is being violated by shebeening at a certain place which is called a club they may employ all lawful methods of detecting the offence thus committed as secretly as possible with the view of preventing detection. The only way that occurs to me of detecting offences is for the police to employ detectives, and where a club was suspected of shebeening the only mode of discovering the truth of the matter was for detectives to go to the club and ask to be supplied with spirits."

#### **Police Spies.**

So far as may be, the police should themselves carry out the actual detection and investigation of crime. In this, they may associate with themselves the complainers, provided that these act under police instructions and respect the rules of fairness

which would be demanded from the police. They may also, when occasion requires, enlist the services of experts—accountants, chemists and the like. To what extent may they take advantage of the services of disinterested and inexpert third parties?

In the opinion of the present writer—(1) the use of members of the public as police spies should be resorted to only where ordinary methods have failed or are bound to fail—e.g., where all available police officers are known to the suspect and would inevitably be spotted. Before resort is had to the outside public for assistance, use should be made of such personnel as boy clerks, typists in the police buildings, members of the Women's Auxiliary Police Corps, and so on. (2) There should in no case be payment by results. If the persons used must be paid, payment should be at a flat rate per hour plus expenses. Even so, the danger will remain that the “spy” will be under the impression, whatever is said to him to the contrary, that his future employment in this capacity may depend upon his “delivering the goods.” (3) It goes without saying that only persons of good character should be employed. The temptation to make use of others, on the principle of “set a thief to catch a thief,” must be resisted. (4) Persons so employed must receive strict orders to the effect that their duty is to detect—not to create—crime; see the next paragraph. (5) Outsiders should in no case be employed where their actions are bound or likely to lead them into a violation of the law—e.g., in detecting sales of liquor in licensed premises outwith the permitted hours; for the persons employed must themselves break the law either by consuming liquor on the premises or by taking it therefrom.

#### “Agents Provocateurs.”

The term *agent provocateur* is used to describe a person who induces or encourages another to break the law so that the other may then be pounced upon and a conviction against him secured. As the duty of the police is to prevent and detect, not to facilitate, crime, they must be constantly on their guard against such action, either on their own part or on the part of members of the public employed by them for police purposes. An officer sent to suspected premises to test complaints of the sale of liquor before the start of the permitted hours is within his rights in entering the shop and asking for liquor—(although it is better practice, where possible, to watch for customers entering and time the police entry to catch them in the act of consuming or await their exit in possession of liquor)—but it would be improper for him to “spin a yarn” to excite sympathy, simulate illness or act in any abnormal way.

It is improper to ask for liquor as a special favour—"Won't you do it for me?" or "Can't you stretch a point this time?" In the same way, officers sent to a public house to detect sales made after hours would act improperly if, by themselves making repeated demands for liquor, they "kept the fun going" until the time arranged for the police raid. In such a case, the officers should purchase liquor just before "closing time," as an excuse for remaining on the premises, and should then content themselves with recording any supplies made illegally.

The case of *Blaikie v. Linton*, 1881, 18 S.L.R. 583, in which a conviction against the Licensing Acts was upset because of the conduct of a turnkey sent by the police to purchase liquor, is in point.

### **The Right to ask Questions.**

In face of suspicious circumstances pointing to the commission of a crime or offence, a police officer has not only a right, he has a positive duty, to ask such questions as may be necessary to clear up the situation to his satisfaction. "If policemen are not entitled to make enquiries when they believe that a crime has been committed, the due discharge of their duties would be seriously hampered." (*Costello v. Macpherson*, 1922, J.C. 9). But there must be no browbeating, no use of threats, or force, no holding out of an improper inducement and no persistent cross-questioning of a suspect into an admission of guilt. Whether what is said by a suspect in response to police questioning will be admissible in evidence at his trial is a matter upon which there is a long series of authorities; but an examination of these would be more pertinent to a treatise on the law of evidence than to the present volume. It is sufficient for our present purpose to emphasise the distinction between answers given by a suspect in course of preliminary investigations and those made by an accused person during the later stages of an enquiry. The latter will rarely be regarded as admissible. All that can normally be proved in the case of a person who has been formally charged is (1) what he says in response to the formal charge, and (2) any later statement expressly volunteered by him and "persisted in after a clear and unambiguous warning." The reason for this is clear. Once an accused has been formally charged and lodged in a cell, the duty of the police becomes purely ministerial. They hold the prisoner merely so that he may be brought before a magistrate in accordance with the law. "When a man has been arrested on a charge of crime and has been incarcerated, it is elementary that all interrogation by the police must cease"—per Lord Moncrieff in *Stark and Smith v. H.M. Advocate*, 1938, J.C. at page 175.

### Administering a Caution.

About 5 a.m. two railway policemen found a railway employee carrying a paper parcel near a hut where there was a coal bunker belonging to the railway company. They asked what was in the parcel, and the employee replied, "Old paper." The police, not being satisfied, asked to see the contents, which turned out to be a piece of coal. They then asked the employee where he had got the coal, to which he replied that he had got it from a miner. At this point, a sergeant of the regular (City) police came up and asked all concerned to go to the police station, so that the statement might be verified and the matter cleared up. On the way, the railway employee voluntarily said, "To save trouble, I may as well tell the truth—I took the coal from the bunker." Up to that time, no charge had been made and no warning given. At the subsequent trial on a charge of theft, objection was taken to the admission of evidence as to the statements made by the accused. This objection was repelled by the magistrate, who convicted. On appeal, the High Court held that the evidence had been competently admitted. (*Costello v. Macpherson*, 1922, J.C. 9).

On this matter of administering a caution to a suspect there would appear to be a good deal of confusion. In the opinion of the present writer, (1) there is no absolute duty on the police to warn a person whom they decide to question, even where there is a likelihood that he may turn out to have broken the law; (2) in general, the point at which a caution becomes advisable is the point at which the investigating officers decide that they have enough to justify a charge being made against the suspect with whom they are dealing. As is made clear in the chapter on "Procedure following arrest," the formal charge should be prefaced by a formal caution. (See page 89).

While this may be taken as the position, the administering of a caution at an earlier stage—especially where the investigation relates to a serious crime and the suspect may well be the culprit—has the advantage that the trial judge may be more readily induced to admit evidence of accused's response to a proper question or of a statement volunteered by him if his position has been brought home to him by a clear warning that he is not bound to say anything, but that anything said by him will be carefully noted and may later be used in evidence. Where a resetter has been named by a thief and officers go to interrogate him, such a caution should invariably be given; for, in proving a charge of reset, much may turn upon the accused's attitude at the time of challenge. Officers who omit the caution may be prejudicing the prosecutor's chances of success either because proof of what the accused said is excluded or because his statement, being made without warning, does not make a deep impression upon judge or jury.

### Must Police Questions be Answered ?

Apart from the exceptions afternoted, there is no obligation to answer questions put by the police. This applies with equal force to questions directed to a suspect, whether rightly or wrongly suspected, and to questions addressed to an obviously innocent member of the public who, being an eye-witness of a crime or having knowledge of facts pointing to the commission of a crime or to the identity of the culprit, is in a position to further the police investigation. So far as the police are concerned, a refusal to co-operate ends the matter. "I wish to have nothing to do with it," "I refuse to answer," "Find out"—in face of such retorts the police are helpless. They cannot insist and the refusal carries no penalty.

To this rule there are important statutory exceptions. Mention may be made of the following :—The Official Secrets Act, 1920, section 6—"It shall be the duty of every person to give on demand to a chief officer of police or to a superintendent or other officer of police not below the rank of inspector appointed by a chief officer for the purpose . . . any information in his power relating to an offence or suspected offence under the principal Act or this Act and, if so required, and upon tender of his reasonable expenses, to attend at such reasonable time and place as may be specified for the purpose of furnishing information and, if any person fails to give any such information or to attend as aforesaid," he is subject to penalties ; the Road Traffic Act, 1930, section 113—"Where the driver of a vehicle is alleged to be guilty of an offence under this Act, (a) the owner of the vehicle shall give such information as he may be required by or on behalf of a chief officer of police to give as to the identity of the driver, and if he fails to do so, shall be guilty of an offence unless he shows to the satisfaction of the court that he did not know and could not with reasonable diligence have ascertained who the driver was, and (b) any other person shall, if required as aforesaid, give any information which it is in his power to give and which may lead to the identification of the driver, and if he fails to do so, he shall be guilty of an offence " (and see section 40 (3) ) ; and section 36 (3) of the Children and Young Persons (Scotland) Act, 1937, which penalises refusal to answer, or, answering falsely, a constable armed with authority to enter premises and make enquiries about a juvenile employed, or being trained to take part in an entertainment, therein ; and the power of a constable to demand a declaration from an alien landing in this country—see under "Aliens" in the list of miscellaneous powers in chapter xiv.

Nor need a person approached by the police give his name and address. To this rule there are a number of statutory exceptions. In certain circumstances, refusal to give one's name and address

to the police or others authorised to demand it, or the tendering of a false name and address, involves a penalty ; in others, it justifies arrest without warrant. Reference may be made to the Parks Regulation Act, 1872, section 5 ; the Gun Licences Act, 1870, section 9 ; the Wild Birds Protection Act, 1880, section 4 ; the Merchant Shipping Act, 1894, section 287 (4) ; the Road Traffic Act, 1930, section 20 and section 40 ; the Public Meeting Act, 1908, as amended by the Public Order Act, 1936, section 6 ; the House to House Collections Act, 1939, section 6 (signature may be required) ; and note the effect of No. 20 of the Defence (General) Regulations, 1939—by which the tendering of a false name would meantime, in any circumstances, be punishable ; and of section 6 of the National Registration Act, 1939, as amended by Reg. 20 A.B. of the Defence (General) Regulations, 1939—see under the heading “ Identity Cards ” in the final chapter.

While the police have thus no general power to compel members of the public to facilitate the detection of crime by giving information in their possession, the criminal authorities are in a stronger position. They may take advantage of the peculiarly Scottish procedure of precognition. Provided that the name and address of the person believed to have information can be discovered, the appropriate public prosecutor has power to summon him for private examination. Both failure to attend and failure to speak out may result in penalties. Where a serious crime is involved, resort may be had to this procedure even though no person has been arrested and no warrant to arrest issued. In the case of less serious crimes, or statutory contraventions, precognition is to be regarded as a process necessarily incidental to proceedings already commenced. (*Forbes v. Main*, 5 Adam 503).

## CHAPTER VI.

## THE CONDUCT OF POLICE ENQUIRIES.

IT is not within the scope of this volume to offer instruction on the detail of police investigation. The purpose of this chapter is to set out certain fundamentals common to all enquiries and to underline the importance of respecting these. Failure to give adequate attention to these "golden rules" may gravely prejudice the success of any prosecution which may follow.

(1) A constable who has reason to suspect that a particular offence is being committed and is giving the matter attention should have in his mind a clear picture of the legal essentials of the offence and should proceed with his enquiry on the assumption that, on a plea of not guilty, he will have to satisfy a court not merely that his actions were justified but that the offence was committed. If time permits, he should, before embarking on the enquiry, refresh his memory on the law which applies. *For instance*—officers detailed to keep observation on a brothel should make themselves familiar with the relevant statutory enactments and with the construction which has been placed upon them by the courts.

(2) In particular, the investigating officers should bear in mind what are the crucial elements in the constitution of the offence suspected—without proof of which the prosecution must fail. *For instance*—if they are investigating a complaint of the sale of intoxicating liquors in a public house after hours, they must realise that time is of the essence of the offence; they must pay close attention to the precise time of supplies and must lay their plans so that they will be able, if need be, to convince a court that these times were accurately noted. A number of years ago, a prosecution of this type, in which the writer was concerned, failed because the officers, while carefully synchronising their watches, in the sense of seeing that they were all set to the same time, omitted to make sure that they were all showing the correct time. Before setting out on such an enquiry, the officers should see that all watches in the party are independently set to correspond with some reliable source of Greenwich time, such as the wireless time signal. Nor would it be enough that one watch should be so set and the others later synchronised with it.

(3) The rules of evidence should be kept in view—especially the need for corroboration and the inadmissibility of hearsay. Here, again, it is important that the investigating officers should

appreciate the special application of the rules of evidence to the type of case in hand—e.g., that, in keeping observations upon a suspected brothel, they should keep in mind the finding of the court in *M'Laren v. M'Leod*, 7 Adam 110, in which it was held competent to prove conversations between persons in the house tending to incriminate the accused, although the accused was not present.

While the importance of securing corroboration on essential points should never be lost sight of, it does not follow that, in its absence, the enquiry should be abandoned and no action taken. A constable who has good reason to suspect the commission of a serious crime may act upon his suspicion—as by arresting the suspect—even although at that stage corroboration is lacking. In dealing with a relatively trivial crime or with a statutory contravention, he should take no drastic action until corroboration has been secured—except in those few cases where a court may convict on the evidence of a single witness. In a marginal case, his best course is to proceed by summons. These matters are more fully dealt with in the chapter on “Arrest.”

(4) It is not enough to secure and make available to the prosecutor, and through him to the court, the bare minimum of evidence. Every endeavour should be made to take statements from all persons who can throw light upon the occurrence which is being investigated, or, if this is not possible at the time, to learn their names and addresses so that they may later be interviewed by the police or cited by the prosecutor for precognition or as witnesses at the hearing. Police enquiry should not be confined to witnesses who are likely to favour the prosecution, and nothing should be done to discourage those who take a different view from coming forward.

#### **The Value of Civilian Evidence.**

In the writer's experience, police officers frequently miss opportunities of buttressing their own evidence by that of disinterested spectators of the incident which is the subject of police action—more especially in the case of an arrest without warrant. Too often the case against the accused is made to rest solely upon the testimony of the arresting officers. On occasion, these officers, when this comment has been made, appear to resent it—“Why should we not be believed?” Such an attitude is unreasonable and springs from a failure to appreciate the difficulties of a magistrate confronted with contradictory evidence. A few minutes delay to jot down the names and addresses of independent bystanders may prove well worth while. Apart from the proving of the charge, the evidence of such persons has a special value to the arresting officers as a protection against suggestions of assault

or over-zealous conduct made against them, at a later stage, by the accused or his friends.

The advisability of securing civilian evidence will naturally depend upon the type of case and the circumstances. No one would suggest that two police officers who find a "drunk and incapable" should, in the absence of some speciality, look about for civilian support; and in other cases, such as a "drunk and disorderly," their hands may be full and their attention fully taken up with the task of controlling the person under arrest. In both these cases, valuable corroboration, on the question of sobriety, will be afforded by the independent opinion of the officer in charge of the police station.

The special value of civilian evidence is (1) that frequently bystanders are in a better position to judge of the merits of an incident than police officers who arrive late on the scene and did not see "the start of it"; (2) that a prosecutor is in a strong position if he can argue that a number of persons, viewing the same occurrence from different angles and with different minds, formed substantially the same impression; (3) that a court will be impressed if it can be shown that accused's conduct was so flagrant that civilians were willing to submit to the inconvenience of an appearance in court; (4) that civilian evidence often carries a special weight because it is not couched in stereotyped language; and (5) that a case is materially strengthened when it rests upon evidence of different types and drawn from different and quite independent sources. Thus, in seeking to prove that an accused was "drunk in charge" of a vehicle, a prosecutor will feel in a peculiarly strong position if he can adduce (a) the evidence of arresting officers, (b) that of bystanders or civilians who, noting the condition of the driver or the erratic nature of his driving, complained to the police; (c) that of the officer in charge of the police station to which the accused was conveyed on arrest, and (d) that of a medical man who later examined the accused; and can argue that all those witnesses, approaching the material facts at different times, from a different point of view and with different interests, reached substantially the same conclusion.

These observations apply with special force to cases of begging, loitering for prostitution and other offences in which civilians are directly involved. In such cases, a special effort should be made to secure the evidence of the civilians affected. One appreciates that, where an extended observation is in progress, officers cannot risk revealing their presence to a suspect, or losing touch with him, by stopping each person accosted (though this may sometimes be possible); but at least the last of the series, who will be nearby when the observation is brought to a conclusion, should be interviewed—if possible, in presence of the accused.

### Statements of Witnesses.

Statements taken by the police from persons who can speak to facts relevant to the enquiry are usually quite informal. They record the full name, occupation, address and age of the witness and what he has to say. They are rarely signed ; but the practice of asking the witness to append his signature to his statement, after it has been read over to him (and preferably after he has had an opportunity of himself reading it and making any corrections or additions), has much to commend it and might, in the writer's opinion, be more generally adopted (1) in cases of serious crime and (2) where the witness is likely to alter his story. When this is done, it is well to insert, between the body of the statement and the signature, a declaration that the statement is true, that it is given freely without inducement or threat and that it has been read by or read over to the witness and that he has had an opportunity of correcting it. The purpose of such formality is not that the witness, if he goes back on his statement later, can be confronted with it in the witness-box (for that would be incompetent), but to impress the witness with the solemnity of the occasion and make it less likely that he will recant.

In taking a statement, it should be borne in mind that its main purpose is to inform the prosecutor what the witness is prepared to say, that it may influence the prosecutor in his decision to prosecute or withhold proceedings, and that, on a plea of guilty, it will serve as a basis for the prosecutor's statement to the court or, on a plea of not guilty, as a guide to him in examining the witness. (These considerations apply more strongly in summary cases, where the prosecutor rarely finds it worth while to take precognitions, than in cases which are to be dealt with on indictment, in which the prosecutor will himself interview the witness before submitting his report to the Crown Office). What the prosecutor wants is the witness's impression of what took place. So far as possible, this should be given in the witness's own words, however crude these may be. On no account should the constable taking the statement put his own "gloss" on the witness's story. It may be necessary to summarise or to omit irrelevant matter ; but, when this is done, great care must be taken to see that the summary fairly represents the witness's position, and it must be remembered that what appears to be irrelevant detail may assume an unexpected significance as the enquiry proceeds.

In dealing with a witness of intelligence, it may be possible to save time and trouble and to arrive at a more accurate result by inviting the witness to set down his own story in his own words. When this is done, the constable should call later for the statement,

read it over in the witness's presence and put to him any supplementary questions which may be necessary.

It may be useful to add to the statement a note of the constable's impression—reluctance to speak, unwillingness to appear in court, deafness, stammering, imperfect knowledge of the language.

#### Police Notebooks.

A constable's notebook is a confidential document. Its production cannot be demanded at the trial either by the judge or by the accused's agent or counsel. It possesses "no evidential quality whatever," and production cannot be compelled. (*Hinshelwood v. Auld*, 1926, J.C. at page 8). "The broad general rule is that any communication which is made by an inferior official to a superior officer in the same department is, on grounds of public policy, a confidential document and is not producable in evidence. The reasons for the rule are too obvious to require much explanation. Official operations of any kind, and particularly the operations of a department of the public service whose function consists in the detection and prosecution of breaches of the law, would be impossible without it"—so said the Lord-Justice General in the case just cited, and he refused to draw any distinction between the actual report and a draft or copy or notes, jottings or precis made by the reporting officers.

If, however, a constable under examination in the witness-box finds it necessary to refer to his notes—as he is entitled to do to refresh his memory or for any other proper purpose—this has the result of making the notes part of the evidence in the case and of rendering them open to general scrutiny. In 1898 (*Niven v. Hart*, 2 Adam 562), a conviction was suspended because the sheriff refused permission to an accused to see notes consulted by a witness to refresh his memory.

In view of the possibility of scrutiny by the accused or by the judge, a police officer is advised to consult his notes only in case of absolute necessity—when some fact (date, time, words used by an accused when charged) has momentarily slipped his memory in deponing to a series of observations extending over a period, possibly some months before, when no one could reasonably expect him to trust his memory for every detail. A police officer who has been cited as a witness is quite entitled to look over his notes before going into the box and in this way avoid the need to consult his notebook in court. The police witness who, on entering the witness-box, at once produces his notebook and opens it may prejudice the prosecution case. What the court wishes him to speak to is not the contents of a notebook but the facts within his knowledge.

Notes referred to in court should be legible, accurate and intelligibly set out. They should contain nothing which can be seized upon as material for devastating cross-examination. Where the circumstances of an extended observation, carried out under difficulties, are such that the making of satisfactory entries in a notebook as events occur is not possible, it is legitimate to take preliminary jottings at the time and, as soon as may be, to make from these a consecutive narrative. If this is done, the original jottings should be preserved—why not attach them to the page of the notebook? It is good practice to add at the end of the narrative of an observation a note of the time and place when the entries were made.

When two or more officers are engaged in an extended observation, each should make his independent notes of times and events and should confine his entries to facts within his own knowledge, ignoring what his colleagues alone saw. The writer can recollect a case in which police officers were badly shaken in "cross" by counsel, who, examining each notebook in turn, discovered that, page after page, the entries were identical word for word.

It goes without saying that deletions should be avoided. When an inaccurate entry has been made, it is better to add a correction at the end with some explanation of the need for it. Pages should be intact and none should be removed.

When an officer has been detailed for what appears likely to be an extensive enquiry entailing a series of observations (as in a case of brothel-keeping), it is suggested that a special book should be procured and kept exclusively for entries relating to that one enquiry. This practice would facilitate ready reference and the quick and easy finding of any entry to which reference must be made while under examination. It creates a bad (and a wrong) impression when a police witness, in seeking for the relevant entry, consults several notebooks and has difficulty in finding the place. Great advantage accrues when the relevant entries are consecutive and not interspersed with statements of witnesses and entries relating to some other case.

In the writer's opinion, the right of the accused to scrutinise an officer's notebook is confined to scrutiny of the parts of the book consulted by the witness and so made evidence in the case and does not amount to a roving commission to examine the book from cover to cover in the hope of spotting something which he can turn to advantage; but on this point there is no express authority.

## CHAPTER VII.

### POLICE ACTION IN EMERGENCIES.

#### ACCIDENTS, FIRES, SUDDEN DEATHS.

It is the duty of the police to enquire, in the interests of justice, into all unusual happenings which may have involved some violation of the law—accidents, fires, sudden deaths. Such happenings are ambiguous. If their explanation is patently innocent, the outcome of pure accident, the investigating officers will completely discharge their duty by furnishing an occurrence report for record purposes ; but innocence must not be assumed merely on the strength of a first impression or of some statement from a member of the public, however credible and disinterested he may be. The sinister possibilities lurking in all such occurrences must be kept well in mind.

#### **Accidents.**

Many accidents of a minor character occur daily without the knowledge of the police ; but they do become aware of most accidents involving serious injury through contact regularly maintained with local hospitals. In all cases, the duty of the police is to investigate the circumstances up to the point where they are satisfied that no criminal element is involved ; to trace witnesses of the occurrence ; to take from them full statements of all facts within their knowledge ; to examine personally the *locus* of the accident and any machinery or vehicle involved, taking such measurements or photographs as may be helpful ; and to embody the result of their enquiries either in an occurrence report to the chief constable or (where some sinister element has emerged) in a report to the criminal authorities. In certain parts of the country, the practice is to report to the fiscal all accidents, irrespective of whether criminal proceedings are likely or not. In the busy centres, one may find an arrangement whereby the police report only suspicious circumstances and not mere “occurrences.”

In dealing with a street accident, a police officer should (1) obtain particulars of, and statements from, all eye-witnesses ; (2) obtain particulars of all injured persons and of the extent of their injuries ; (3) examine carefully all vehicles involved, noting their position on his arrival, discovering whether they have been moved after the collision, and noting any damage sustained by them, their index numbers, type, horse power, etc. ; (4) note the lighting

conditions, weather and condition of the roadway ; (5) examine the roadway for skid marks, normal tyre marks, signs of braking and the like and for "pot holes," obstructions or defects on the road surface ; (6) obtain particulars of the drivers of all vehicles concerned and of their owners, and apply his mind to the drivers' sobriety ; (7) note all damage to property—lamp posts, walls, railings, etc. ; and (8) if the accident occurred during or near the hours of darkness, ascertain the precise time of the impact, the time of sunset (sunrise) on that day and the state of the lighting of the vehicles. Where motor vehicles are involved, the terms of the Road Traffic Acts should be kept in mind and the following points should have particular attention—the possession, by the drivers, of current driving licences (also Road Fund Licence on the vehicle), the existence of insurance covering the use to which the vehicle was being put—particulars of all which should be noted ; whether the vehicles conform with the requirements of the Regulations ; speed and evidence pointing to careless or reckless driving ; sobriety of the drivers. Where Public Service vehicles and goods vehicles are involved, additional particulars of the licences peculiar to such vehicles must be noted. The provisions of section 21 of the Road Traffic Act, 1930, should be honoured and drivers of motor vehicles warned of the possibility of prosecution. In view of the recent High Court decision in *Watt v. Smith*, 1943, S.L.T. 101, the warning should be in the following or very similar terms—"It is my duty to warn you that the question of prosecuting you for speeding or for careless driving or for reckless driving will be taken into consideration." The alternatives open under section 21 should be kept in view—the service of a summons or of a notice of intended prosecution within fourteen days—and, so that (where it has not been possible to warn the drivers "at the time" (i.e., while they were still at the *locus*), this may be done, police reports should reach the prosecutor in good time. Where an exhaustive report cannot be quickly completed because of the absence of material witnesses, an interim report should be furnished within five days of the occurrence.

Fatal accidents are dealt with under the heading "Sudden and Suspicious Deaths" later in this chapter.

#### **Fires.**

A responsibility rests upon each Procurator-Fiscal in Scotland to enquire into the origin of fires occurring in his territory which (1) have resulted in extensive destruction of, or damage to, property ; (2) have endangered, or caused the loss of, life, or (3) are attended by circumstances giving rise to suspicion of wrongdoing. This responsibility is normally discharged by considering the

terms of reports of fires forwarded by the police, by citing to chambers and personally precognoscing the witnesses named and designed in these reports, by instructing, where need be, further police investigation and finally by sending to the Crown Office in Edinburgh a comprehensive report of the circumstances as revealed by this enquiry. It is understood that the attitude of Procurators-Fiscal varies in their estimate of what amounts to extensive damage. In certain districts, the practice is to report to the fiscal only fires involving damage of £100 and over—and, of course, fires involving loss of life and attended by suspicious circumstances—and to be content, in the case of smaller fires, which appear to have arisen from accident or unavoidable causes, with an "occurrence report" to the chief constable for record purposes. In other parts of the country, the line is drawn at £250, and in some parts, it is understood, all fire reports are brought to the fiscal's notice.

In preparing a report, the police will rely, in the first instance, upon the impression formed by the officer in charge of the fire brigade called to the scene of the outbreak; but they must not accept his impression as conclusive and are under the duty of themselves instituting an independent enquiry. Each enquiry will depend, for its detail, upon the particular circumstances with which the investigating officers are confronted, but, in every case, all persons who can throw light upon the origin of the fire must be traced and interviewed, the nature and extent of the damage, the time of the outbreak, the particulars of the ownership and occupancy and the character of the buildings affected and details of the fire insurances must be noted. Contact should be established with the insurance company concerned and with its assessor, whose estimate of the amount of the damage will be relied upon. A sharp lookout should be kept, on the first visit to the premises affected, for signs of incendiarism and any unusual features. If found, these should be carefully detailed in the report, which should also note the wind and weather conditions and the number and type of fire appliances used to fight the fire.

#### Sudden and Suspicious Deaths.

A "sudden" death, in the present context, is one which has happened unexpectedly—so that the safeguards afforded by regular visits of a doctor over a period before the death are absent, or one may prefer the definition recently hazarded by an experienced police surgeon—"a death which is not preceded, or is only preceded for a very short time, by morbid symptoms, that is, any indications of illness." The sudden death is typified by the case of the youngish man, to all appearances hale and hearty, who has not been "under

the doctor " for some time, to whom years of health would seem assured, but who drops down in the street before witnesses or who is found dead at home by relatives, at his place of business by an employee or in some public place by the police or a passer-by ; but the term extends to happenings of a widely different character—the elderly man with a " heart " who collapses after running for a tramcar ; suicides ; victims of accidents or fatal assaults—these and many others are covered. A suspicious death is one which, whether or not it occurred unexpectedly, is thought at the time to be, or is later discovered to have been, attended or preceded by circumstances which point to foul play.

Sudden deaths may, in fact, be due to (1) accident—as in a street collision, railway smash, mining disaster, or the like ; (2) natural causes (diseases of the heart or blood vessels, cerebral haemorrhage, rupture, etc.) ; (3) suicide or (4) violence, criminal recklessness or negligence on the part of some person other than the deceased. The cause may be at once apparent or may emerge on very slight enquiry ; it may be reached only by exhaustive investigation ; or it may never be ascertained with certainty. To arrive at the cause of death by a process of elimination of common alternatives—" not accident ; not natural causes ; not suicide ; therefore murder "—is unsafe. (*H.M. Advocate v. M'Millan*, 1940, S.L.T. 420). In the end, one may be left with sheer mystery.

It may happen that a death, accepted as normal at the time, becomes suspect later through discovery of suspicious antecedent or accompanying circumstances, the receipt by the authorities of an anonymous letter or the growth of rumour in the neighbourhood. There is then a strong duty on the police to press enquiry to the point where sinister possibilities are discredited with reasonable certainty.

As with fires, the main responsibility for investigating sudden or suspicious deaths is laid upon the Procurator-Fiscal, who will normally receive his first intimation and impression through a police report, written or verbal. (It may, however, occur that, through a hint in an anonymous letter or a suggestion made to him by a caller, the fiscal will learn of the occurrence or of suspicious circumstances ; in which case, he will normally instruct the police to enquire and report). Having perused the police report, the fiscal will supplement it by such independent enquiry as may commend itself to him and usually by formal precognition and written report from a qualified medical practitioner and will in turn submit a report of the facts to the Crown Office for instructions. As the exigencies of the particular case demand, he may instruct a *post mortem*, order removal or exhumation of a body,

seek the sheriff's authority to these ends and generally issue such proper instructions and take such steps as may be necessary.

The private investigation made by the Procurator-Fiscal must, in the case of "industrial" fatal accidents, and may, "in any case of sudden or suspicious death in Scotland," if the Lord Advocate thinks it expedient in the public interest, be followed by a public enquiry before a sheriff and jury. (*Fatal Accidents Inquiry (Scotland) Act, 1895*, and *Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1906*). Such inquiry is also held in the case of death of a prisoner in a prison. (*Prisons (Scotland) Act, 1877*). In a limited range of cases, provision is made by particular Acts of Parliament for public enquiry on the instructions of such central departments as the Home Office or Board of Trade. There is, in Scotland, nothing precisely corresponding to the coroner's inquest.

Note the sheriff's power, under section 5 of the Act of 1895, to grant warrant to officers of the law to seize and retain articles for production at a public enquiry.

#### **Police Enquiry into Sudden Deaths.**

Sudden deaths vary so widely in their character and in the circumstances of their discovery that rule-of-thumb procedure cannot be adopted; but the following general rules apply in most cases and may serve as a guide:—

The investigating officer must, at the earliest possible moment, view the body. He must be satisfied that life is extinct and on this matter (except in such clear cases as decapitation) will accept nothing less than the opinion of a qualified medical man. He must take such steps as are possible to have the body identified and, if this cannot be done without delay, must take a careful note of its characteristics—height, colour of eyes and hair, visible marks, and so on, and, where possible, have a photograph and fingerprints taken. He must note anything unusual and any marks of violence. He must, wherever possible, take full particulars of the deceased—name, address, occupation, age, whether married or single, and must trace and interview all persons who can speak to the time, place, or circumstances of the death or can throw light upon its cause. He must, as soon as may be, notify the police surgeon and put him in possession of the facts.

Where, in course of the routine enquiry, the officer's suspicions are aroused, he will require to extend his investigations to embrace such matters as the medical history, mental condition and financial position of the deceased, faulty personal relationships in a household, the existence of a private grudge against the deceased, the

presence of motive to injure him, the possibility of benefit accruing to some person through the death, the legitimacy of a child, the treatment of a child by the person in charge before its death, and all other matters which may serve to explain the occurrence.

While investigating officers should proceed with caution and courtesy and should respect the feelings of bereaved relatives, they should never allow their enquiries to become, on this account, perfunctory. They should be slow to accept at their face value the statements of interested parties or persons who may be affected by the outcome of the enquiry. They should not be put off their guard merely because they are dealing with persons apparently respectable or because the deceased is advanced in years and therefore more likely to have died a natural death.

Police action will be determined, and a twist may be given to the enquiry, by the special facts of the particular death and the circumstances of its discovery. One may take, as illustrative, the case of a constable on his beat who discovers, lying on the footway, a person apparently dead. How should he act? (1) He should, so far as he can, prevent persons already on the spot slipping away before he can take their names and addresses and elicit from them what they know about the incident—did anyone see the man fall or violence used? Can anyone say how long the body has been lying? (It may be possible to find someone who will say “I passed the spot at 11.30 and it was not there; I passed again at 11.35 and it was”); Was anyone seen running away or hanging about in waiting?; Has the body been moved or touched?; Has any weapon or implement been seen and, if so, where is it now? It must, of course, be understood that the constable has no right to detain bystanders forcibly and that they are at liberty to say “We want to have nothing to do with it.” If, however, he should, as he approaches, see a man running from the scene pursued by others, or if bystanders point to the man and accuse him, the constable’s duty will be to pursue the suspect and arrest him. (2) His next concern will be to save life. Unless it is clear (e.g., from extensive mutilation of the body) that life is extinct, this must not be assumed and a medical opinion must be procured. In a city, the simplest method of securing this may be to summon an ambulance—e.g., by sending a civilian to the nearest telephone or police box, so that the body may be removed to a hospital. Meantime, until the ambulance arrives, the constable must pursue his enquiries, interrogate witnesses, make a careful survey of the body and its surroundings, note how the body is lying and the exact position, relative to the body of any weapon, implement or other object, have a photograph taken, if possible, prevent any unauthorised person interfering with the

body or any such object, and institute enquiries (so far as that can be done on the spot) to identify the person or discover where he lives or works. (3) Where it seems likely that violence has been used, the constable (in a city force) should send word to the C.I.D. and see that the body is neither handled nor removed until the detectives arrive—and preferably, also, until a doctor is on the spot. When, for some imperative reason, the body cannot be left lying where found, it should be lifted aside with the utmost care; but only after careful note has been taken of all particulars of its appearance and situation. (Why not ask a civilian to note particulars as corroboration?).

It will be appreciated that, although the steps just indicated have been numbered and arranged in a particular order, the priority and emphasis may vary. Where the "victim" is, or may well be, still alive and a preliminary survey reveals nothing suspicious, the constable's first thought will be—what can I do to save his life? Where, on the other hand, life is extinct beyond any reasonable doubt, the sinister possibilities may have first claim. In many cases, the constable will feel that he is in a dilemma, torn between two duties. In the writer's opinion, the saving of life is the paramount consideration and must be attended to without delay even if, incidentally, valuable evidence is lost. As has already been indicated, the dilemma may be resolved by summoning an ambulance and taking advantage of the interval before its arrival to pursue local enquiries.

Nor should the police, having deposited the "victim" in medical hands at a hospital, lose interest in him. They must maintain touch with the institution and keep themselves informed of the patient's condition. At any moment, it may be necessary to arrange for the taking of a dying deposition—for which arrangements will be made by the Procurator-Fiscal—or, if time does not permit of this, to take a declaration from the dying man. The declaration may be taken down in writing by any credible person. It should conclude with a declaration that it is all truth and should, wherever possible, be signed by the dying witness. It should, in any event, be signed by the person taking it down and by two witnesses, one of whom should preferably be a medical man who can speak to the patient's physical and mental condition. A constable who, finding a man seriously injured on the street, has summoned aid and, returning to the scene, finds the man in what appears to be a dying condition, should not hesitate to record any statement which the man may make, observing as many of the formalities as are practicable and calling upon civilians present to witness the statement.

When a body has been found in the open and immediate identification or contact with relatives or friends is not possible, or

where the relatives or friends, although traced, are unwilling to undertake the registration of the death, the police should themselves inform the registrar, give such facts as are available and state that the circumstances are being investigated by the Procurator-Fiscal.

### Possession of the Body.

In what circumstances should the police take possession of a body, causing it to be removed to a mortuary for the instructions of the Procurator-Fiscal? This should be done (1) in the case of the discovery of a body lying outside, when either the identity of the deceased cannot be at once established or the circumstances raise a suspicion of serious crime; but again it is emphasised that before removal a medical opinion that life is extinct should be obtained and a systematic examination of the *locus* should be made on the lines already indicated; (2) when the sudden death has occurred in unoccupied premises or in premises other than those where the deceased resided, when there is present no relative or responsible friend to take charge; (3) when the circumstances are suspicious and the body is either lying in premises other than the deceased's ordinary residence or would be in charge of persons of disreputable character or persons suspected; and (4) generally, when no proper person comes forward to claim possession. When the body is lying in the deceased's ordinary residence and there are present apparently respectable persons willing to take charge, removal of the body should not be resorted to without either the free consent (preferably in writing or at least given before two witnesses) of the occupier or person in charge or a sheriff's warrant. In case of doubt, the safe course is to communicate with the Procurator-Fiscal and accept his instructions.

The police should take possession of bodies only when this is essential in the interests of justice. They are not concerned with lack of accommodation or danger to health. Where such elements are present, the matter must be adjusted between the occupier of the premises and the public health authorities.

### Clothing and Property of the Deceased.

Where the police have power to take possession of a body, they may also examine and take possession of the clothing and property of the "victim" (i.e., of the contents of his pockets and of a handbag, attache case, or the like in his possession at the time of the death). This they may do (1) in order to establish his identity, (2) where necessary in the interests of justice—i.e., where examination of clothing or property may yield a clue to the nature of the crime or the identity of the criminal, and (3) for safe custody.

Normally, the removal of articles from the pockets and the detailed examination will take place only after the mortuary has been reached ; but it may be desirable, for some particular reason, to interfere with personal effects on the spot. In that event, the police officer concerned should safeguard himself against later insinuations by relatives by making his search in presence of at least two respectable members of the public, who should be asked to check over and make a written note of the articles discovered and to sign an inventory prepared there and then. Articles taken possession of should be placed in a suitable receptacle and, as soon as may be, labelled. Even when search has been deferred until arrival at the mortuary, it should, wherever practicable, be made in presence of a superior officer or some independent person and the precautions indicated should be taken. The possibility of money or valuables being sewn into the clothing should not be lost sight of.

The suggestions made under this heading are subject to the warning, already given, that there should be no interference with the body, clothing, property or articles in the neighbourhood until the arrival of a medical man or of detective officers or at least until a careful note has been made of all particulars.

The ultimate disposal of property taken possession of will depend upon (1) its value as evidence, and (2) the coming forward of a claimant or claimants. Articles which may reasonably be required as productions in later criminal proceedings may be retained. Articles of small value, not so required, may be handed over to the next of kin on a receipt. Articles of considerable value or large sums of money should not be parted with except to the executor on production of confirmation, payment of expenses of interment and the granting of a receipt.

## CHAPTER VIII.

### THE ARREST OF SUSPECTS.

A SUSPECT may be brought before a Scottish criminal court (1) by immediate arrest, without a warrant ; (2) by arrest on the verbal order of a magistrate—an unusual occurrence ; (3) by arrest on a written warrant ; and (4) by summons (complaint)—but only if the crime or offence alleged may competently be dealt with summarily. The word “ summarily ” calls for explanation.

#### “ Summary ” and “ Solemn ” Procedure.

In Scotland—as in other countries with a highly developed system of law—the procedure by which justice is dispensed varies with the nature and seriousness of the crime or offence. Relatively trivial breaches of the law are tried in summary courts by a procedure which is quick and informal. Grave crimes and serious offences are the prerogative of the solemn courts, which proceed in a more deliberate and formal manner.

The chief distinctions between the two types of procedure are—

(1) That courts of summary jurisdiction are local in character and most, though not all, of the judges are laymen, untrained and unpaid ; whereas the solemn courts cover either the whole country or a wide sweep of territory and the judges are invariably trained in the law ;

(2) that proceedings in summary courts are initiated by a simple document known as a complaint or summons at the instance of a burgh prosecutor or county procurator-fiscal ; whereas solemn procedure is on indictment—a much more formidable document—at the instance of H.M. Advocate ;

(3) that one never finds a jury in a summary court ; whereas a judge in a solemn court has—on a plea of not guilty—the assistance of a jury of fifteen laymen.

The principal courts of summary jurisdiction are—the J.P. Courts, the Police or Burgh Courts and the Sheriff Summary Courts. There is no practical distinction between a police and a burgh court.

The courts of solemn jurisdiction are the Sheriff Principal’s Court and the High Court of Justiciary.

### Arrest or Summons ?

To arrest out of hand is, from the police point of view, the simplest and most effective way of dealing with a suspect. It has evident advantages. The suspect passes into police control. He may be searched, fingerprinted (if his crime is serious), put up for identification, seen by other officers who are investigating similar happenings for which the person now arrested may turn out to be responsible, confronted by accomplices and questioned in privacy—though a word will be said in the next chapter as to the legality of these latter steps. It is made more difficult for him to concoct a defence or dispose of tell-tale evidence. Time is saved—and labour—for the prosecutor may be content with a summary of the facts much less exacting than the individual statements of witnesses usually embodied in a report for summons. The hand of the prosecutor is to some extent forced; for he is presented, next morning, with a *fait accompli* and deprived of an opportunity to consider at leisure whether proceedings are justified. For these and other reasons, there is for the police a standing and insidious temptation to resort to immediate arrest.

If the investigating officer is to keep himself on the right side of the law, that temptation must be resisted. The "golden rule"—in practice, it is to be feared, a counsel of perfection—is that no suspect should ever be arrested without warrant and that no warrant should ever be applied for where the ends of justice can be met by telling the offender that he is to be reported and by the subsequent service upon him of a complaint, if the prosecutor so decides. Even where power of arrest without warrant would appear to be justified at common law or under statute, it is extremely doubtful whether the courts would support the arresting officer in circumstances where a summons would serve the purpose equally well.

Alison, in his "Practice" (Volume 2, page 117), confines the right of immediate arrest, even in relation to serious crime, to cases "where dispatch is indispensable" and where "without such an instantaneous stretch of authority there would be a reasonable danger of the criminal escaping." This expression of opinion is in line with the decision of the Court of Session in *Peggie v. Clark*, 7 M. 89, in which it was held that "the officer is not entitled to overstep the necessity or reasonable requirements of the particular case," and in which Lord Deas drew an instructive distinction between the case of a person accused of murder, "the very nature and punishment of which would render absconding the probable or natural result," and that of a well-known householder, generally regarded as law-abiding, charged with some lesser crime.

In a recent English case (*Gorman v. Barnard*, 1940, 3 All E.R. at page 464) a somewhat similar reasoning was applied to the power of arrest conferred by a particular statute and the view taken that the power was to be asserted only if the character of the offence was such that in the interests of public safety or on account of threatened danger to life, limb or property, prompt action was called for. (The decision of this court was upset in the House of Lords, but this expression of opinion was not doubted).

Subject to the caution just given—

*A constable is justified in arresting without warrant—*

On suspicion of a *grave crime*—

- (1) if he sees the crime committed ;
- (2) if he sees a person running from the scene of the crime pursued by others ;
- (3) on information from *one* credible witness of the *recent* commission of such a crime.

On suspicion of a *less serious crime* (e.g., petty theft or minor assault)—

As above, but *two* witnesses or corroboration.

In deciding whether to act upon information, a constable must assess the credit to be given to his informant's story. Is he sober, sure of his facts, able positively to identify the culprit? Does his story tally with the probabilities of the situation and the facts, so far as these can be tested on the spot—e.g., where assault is alleged, does the complainer bear corresponding marks of injury? “If from the circumstances it appears to be an unfounded charge,” said an English judge in 1858, “the constable is not only not bound to act on it, but he is responsible for so doing.” (*Hogg v. Ward*, 1858, 3 H. & N. 417 at 422). Naturally, the less serious the crime alleged, the greater the caution to be exercised and the need to consider whether procedure by summons might not meet the case.

Where a charge, such as assault, has been made by some person against another who is near at hand, the prudent course is that the constable to whom the charge has been made should require the suspect to remain where he is or to accompany him while he interviews the complainer and any witnesses available. Should the suspect refuse or attempt to escape, he should be seized. A convenient *via media* is to ask all concerned to come to the nearest police box or station, so that the allegation may be enquired into in quietness and privacy.

An allegation by an intoxicated person against one who is sober or by a person of known bad character against one of standing and respectability should be cautiously received and carefully investigated, but should not be rejected out of hand. In the absence of corroboration from some truly independent source, and unless the crime alleged is really serious, procedure by summons is to be preferred. It is well to keep in mind that an intoxicated person may, in perfect good faith, attribute to violence on the part of an innocent bystander injuries sustained by falling.

It may happen that persons who have seen a crime committed by some person who is a stranger to them lose sight of the offender, but, within a short time, succeed in locating him in another part of the same district and point him out to a constable. Should he admit his identity as the person involved in the incident complained of, no difficulty arises ; he may be arrested. Should he deny all knowledge of the occurrence, great caution is called for, however positive the complainer and his witnesses are. Mistakes in identity do occur and are not least to be expected where an offender has eluded an aggrieved party who, still harbouring resentment, is anxious to pin responsibility on someone and obtain satisfaction. (Incidentally, the possibility of an innocent mistake is not ruled out by the fact that the offender was in some way distinguished from the ordinary run of people—e.g., by wearing uniform ; one soldier is very like another and there is a temptation to an injured party who has been wronged by a soldier to fix upon the next man in the same uniform whom he encounters). Corroborative elements should be looked for—is the man, if he is alleged to have bolted, out of breath ? ; is he in hiding or are his movements furtive ? ; in an allegation of indecent exposure, is his clothing disarranged ? ; and so on. If such elements are present, the complaint should be acted upon notwithstanding the suspect's protestations of innocence. If not, and especially if the suspect is sober and a man of apparent respectability and, so far as the constable is aware, of previous good character, the prudent course is to engage him in conversation, informing him of the nature of the complaint against him, asking him to supply his name and address and vouch his identity, so far as he can, by the production of papers, to question him, quietly and with courtesy, as to his recent movements and to invite him to produce witnesses, if he can, to support his story. While refusal to give particulars is not conclusive of guilt—for a suspect is normally under no duty to answer questions and an innocent person may resent police interference—it might tilt the balance in favour of arrest. If the crime is relatively trivial and the suspect sober and peaceable and his identity can be ascertained with certainty, why not be content to report for summons ?

One occasionally encounters a reluctance, on the part of the police, to inform a suspect, at the time of his arrest, of the precise nature of the complaint made against him—"You'll know when you get to the police station." Such an attitude is unintelligible, except in the case of a melee or, say, the arrest of a "drunk and incapable." If the person arrested is guilty, what harm can be done by telling him what he already knows? If innocent, he is entitled to be told.

When an arrest has been made by a constable who himself saw the crime committed or on the allegation of one witness only, the accused must be liberated within a few hours unless by that time corroboration is forthcoming. If, however, the crime is very serious (e.g., murder, rape), the risk of longer detention should be taken. In case of doubt, the appropriate prosecutor should be consulted. A constable arresting on his own observation should make a point of taking the names and addresses of all eye-witnesses (and also of bystanders, in case any question is raised as to the constable's conduct at arrest) and, as soon as possible, should take from them detailed statements.

In addition to cases in which a constable has positive evidence of the commission of a crime, he may resort to immediate arrest *where he finds a person in possession of goods known or believed to be stolen*. This is a power to be asserted with the utmost caution. As illustrative of circumstances in which arrest out of hand would be justified, see *Costello v. Macpherson*, 1922, J.C. 9—railway employee found at 5 a.m. near a hut where coal was stored carrying a paper parcel containing coal; and *Melvin v. Wilson*, 9 D. 1129—workmen carrying a peacock through the streets at 2 a.m.

The case of *Dumbell v. Roberts*, 1944, 1 All E.R. 326, underlines the risk of drastic and precipitate action by the police without making, on the spot, such enquiry as is reasonably practicable to test the validity of their suspicions and the truth of an explanation tendered by the suspect. The plaintiff, Dumbell, brought an action against constables of the Liverpool City Police, who had arrested him about 10.30 p.m. while he was cycling home from the garage at which he was employed. The reason for the police action was the discovery of a sack, attached to the bicycle, containing about 14 lbs. of soap-flakes (a rationed commodity). On challenge, Dumbell said that he had got the flakes from "his mate." He told the police that he had come from "the garage," which was nearby. The police then took him back to the garage—or invited him to go back with them—but arrested him outside the garage, on his telling them that his mate was not there, without making any enquiries inside the garage. Before making the arrest, the police did not ask the plaintiff's name and address.

Having made the arrest, they took him to a police station, where he was formally charged and allowed bail. He appeared later before the city magistrates, when a remand was granted on the request of the police. The case was later disposed of, the plaintiff being "absolutely cleared of the charge." The plaintiff was a householder and had lived at the same address for 20 years. Damages were awarded against the arresting officers.

While this case turned upon the wording of a local police Act and upon the failure of the arresting officers to comply with the condition precedent to exercise of the power of arrest in the section relied upon (which authorises arrest without warrant only of a person whose name and address are unknown and cannot be ascertained), certain general observations by Scott, L. J., are significant. Dealing with the common law powers of the police, he said : "The police are not called upon, before acting, to have anything like a *prima facie* case for conviction ; but the duty of making such enquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable does rest on them ; for to shut your eyes to the obvious is not to act reasonably . . . . The duty of the police when they arrest without warrant is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty. The British principle of personal freedom, that every man should be presumed innocent until he is proved guilty, applies also to the police function of arrest—in a very modified degree, it is true, but at least to the extent of requiring them to be observant, receptive and open-minded, and to notice any relevant circumstance which points either way. They may have to act on the spur of the moment and have no time to reflect and be bound, therefore, to arrest to prevent escape ; but where there is no danger of the person who has *ex hypothesis* aroused their suspicion that he probably is an "offender" attempting to escape, they should make all presently practicable enquiries from persons present or immediately accessible who are likely to be able to answer their enquiries forthwith. I am not suggesting a duty on the police to prove innocence ; that is not their function ; but they should act on the assumption that their *prima facie* suspicion may be ill-founded. That duty attaches particularly where slight delay does not matter because there is no probability, in the circumstances of the arrest or intended arrest, of the suspected person running away."

#### **Arrest without Warrant must be immediate.**

The powers of arrest without warrant, of which an explanation has already been given, must be asserted at the time of the incident complained of or immediately or shortly thereafter. With the

passage of time, the right flies off and it becomes necessary to apply for a warrant to arrest. What lapse of time operates to make a crime "stale" and so to defeat the constable's power of arrest out of hand has never been precisely determined. It might be held to vary with the seriousness of the charge made. In the case of a relatively trivial assault, it would be unwise to arrest after the lapse of, say, two hours. In the case of a really serious crime, arrest might be excused at any time on the day of the occurrence. In the absence of authority, one cannot be more definite. Where a constable has information of the commission of a crime by some person who has eluded capture and where restraint is desirable in the interests of justice, his wise course is at once to make application for a warrant. If the warrant is granted and the offender later located, the arrest will then be made under the full protection of the law.

To this rule that the power of arrest without warrant lapses with time, there is an exception. Where a serious crime has been committed and the offender is found later in circumstances which point to his being in hiding or about to abscond, or where it is not possible to ascertain his identity with certainty, arrest should be made. Where the crime alleged is a particularly grave one, such as murder or rape, the intention to abscond may reasonably be assumed. In the case of an offender whose identity is unknown, a warrant could not have been applied for and, even in the case of a lesser crime, arrest without warrant on a later date would be more readily excused. If, however, when such an offender is ultimately traced, he turns out to be a respectable householder, why not a summons?

#### **Statutory Contraventions.**

When circumstances point to the commission of an offence punishable under statute only, the existence of power of immediate arrest depends upon the wording of the Act contravened or, more rarely, upon an express power conferred in a later Act. The presumption is that statutory contraventions are intended to be dealt with either by the submission of a summoning report to the public prosecutor or, where special reasons make more drastic action imperative, by applying to a magistrate for a warrant to arrest. This presumption is displaced (1) by words in the Act contravened which empower a constable to arrest without warrant in the particular circumstances which have emerged and (2) possibly by special facts (such as the drunkenness of the offender) which make immediate action desirable in the interests of justice—see the paragraph below headed "The Offender's Character and Circumstances."

Everything turns upon the precise wording of the power relied upon, for statutory authorisations of arrest out of hand vary greatly in their scope. Contrast section 6 of the Official Secrets Act, 1911, which, *inter alia*, permits of the arrest of any person reasonably suspected of being about to commit an offence under that Act, with section 9 of the Gun Licence Act, 1870, by which failure to produce a licence and also failure to declare name and address are made conditions precedent of the exercise of the power of immediate arrest. Where the power to arrest is thus made conditional, the requirements must be strictly complied with. (*Lundie*, 21 R. 1085; *Dumbell v. Roberts*, 1944, 1 All E.R. 326).

In construing statutory powers of arrest, the following points should be kept in mind—

Where a statute authorises the immediate arrest of a person "reasonably suspected" of having committed a specific offence, a constable may be found liable in damages although his suspicions were, in his own judgment, reasonable and although he acted in perfect good faith. The question whether the suspicion was reasonable is one to be determined by a court. (*Shields v. Shearer*, 1914, S.C. (H.L.) 33).

Where a statute authorises immediate arrest of any person committing a specific offence, a constable is safe to arrest without warrant (in circumstances which make arrest advisable) if he honestly and on reasonable grounds believes that the person is offending. (*Isaacs v. Keech*, 1925, 2 K.B. 354, following *Trebeck*, 1918, 1 K.B. 158). "In enacting a provision of that kind empowering a constable to take into custody without a warrant a person who commits an offence, the legislature has two conflicting interests to consider. There is, on the one side, the interest of the individual, who should be protected against illegal arrest, and there is, on the other side, the interest of the public, which requires that, for the maintenance of order and safety, there should be an immediate interference with persons committing certain offences . . . . I think, however, that the whole trend of authority has been to put a uniform construction upon the enactments giving a power to arrest without warrant a person found committing an offence and to hold that what the legislature has in mind is not the mere power to arrest a person ultimately found guilty of the offence, but is a power to be exercised by the proper authority of acting at once on an honest and reasonable belief that the person is committing the particular offence." (Per L. J. Bankes in *Isaacs*, supra). But see the comments on this passage in *Ledwith v. Roberts*, 1937, 1 K.B. 232; *Gormand v. Barnard*, 1940, 3 All E.R. 453, and *Barnard v. Gorman*, 1941, 3 All E.R. 451.

Where the statute authorises arrest of a person "found committing" an offence, this means in the act of committing. For the English authorities, see Stone's Justices Manual, 1943 edition, page 222. An English Divisional Court held that a person found in possession of clothing purchased by him from a soldier six days previously was "found committing" an offence against the Army Act, section 156. (*Laws v. Read*, 63 L.J., Q.B. 683).

In order that constables may make themselves familiar with the precise extent of these special statutory powers, the writer has compiled a list, which is to be found at the end of this chapter. Where necessary, the words of the Act are fully quoted; but in certain cases a brief summary is given. The list may not be exhaustive.

Even where the offence suspected is a serious one, power to arrest without warrant must not be assumed. Certain statutes impose very heavy penalties but give no such power.

The insistence, at the beginning of this chapter, upon the desirability of avoiding arrest and proceeding by summons wherever possible applies with peculiar force to statutory contraventions. Procedure by summons is "the proper course to take in the case of . . . summary offences unless, where there is power to arrest, there is reason to believe a summons would not be effectual." (*Dumbell v. Roberts*, 1 All E.R. at p. 332).

Neither section 12 of the Police (Scotland) Act, 1857, nor section 86 of the Burgh Police (Scotland) Act, 1892, nor the corresponding sections of local police Acts are to be construed as conferring a general power to arrest suspects. If read literally, these sections would authorise immediate arrest of any person suspected of having violated any provision of the criminal law. The true view is that they give to the police no power not already possessed by them either at common law or under statute. (*Peggie v. Clark*, 7 M. 89).

#### **The Offender's Character and Circumstances.**

How far may the rules as to arrest without warrant be modified to meet the case of a suspect or actual offender who (a) has a criminal record, (b) has no fixed residence, (c) is drunk, or (d) is violent or threatening to repeat the offence? This is a question to which, in the present state of the authorities, it is not possible to give, in every case, a dogmatic answer.

In at least one case, the possession of a criminal record gives a drastic power of immediate arrest. A constable may take into custody without warrant any convict on licence or supervisee whom he reasonably suspects of having committed any offence. (Penal Servitude Act, 1891, section 2).

Angus, in his "Police Powers and Duties" (2nd edition, at page 63), commits himself to the sweeping assertion that immediate arrest is justifiable in all cases where a charge, no matter how trivial and whether under statute or at common law, provided it be supported by sufficient evidence, is preferred against a person who "is drunk, disorderly or violent or threatening to repeat the offence or without any known settled place of abode or a stranger and fails or refuses to give satisfactory information as to his true name and place of abode." No authority is cited in support of this opinion. Possibly the writer had in view the judgment of Lord Deas in *Peggie v. Clark*, 7 M. 89—"If the criminal is in hiding or the officer is credibly informed, or has good reason to believe, that he is about to abscond, the officer may *de plano* arrest him to prevent justice from being defeated . . . . If a suspected individual belongs to a class of persons reputed to live by crime or who have no fixed residence or known means of honest livelihood, in all such cases a constable has large powers of apprehending without a warrant. But . . . . he is not entitled to overstep the necessity or reasonable requirements of the particular case." Lord Deas, it will be noted, was dealing with a "criminal"—i.e., with a person suspected of having committed a serious crime at common law. It is doubtful how far the doctrine of *Peggie v. Clark* can be stretched to apply to a statutory offender.

Angus further suggests (pages 62 and 63) that the right of immediate arrest is stronger in the case of a statutory offence punishable by imprisonment than in the case of one punishable by a fine. Again, no authority is cited and the statement should not be relied on. (See, however, section 88 of the Glasgow Police Act, 1866, where the distinction assumes importance because of the wording of the power of arrest there given).

In the opinion of the present writer, police officers are not entitled to assume that wide liberties may be taken with persons who have a criminal record or who have no fixed place of abode or who, when found committing a trivial offence, are the worse of drink. Such persons have their rights—though, to the advantage of the police, they are rarely aware of them. The practice of rounding up, from among the lodging-houses, all "criminals" who were known to be at liberty on the occasion of the commission of some serious crime is attended with grave risk to the investigating officers. An exception may be made in favour of such action in the case of a criminal whose *modus operandi* corresponds to that used in the commission of the crime, for there is strong reason to believe him to be the guilty person. To this extent one may accept the opinion of Angus (page 65) that "persons who do not follow any lawful occupation, but subsist in great part off the proceeds of crime, may be apprehended on reasonable suspicion of crime."

### When is a Person "Under Arrest"?

In the opinion of the present writer, a person is to be regarded as "under arrest" when, because of the presence of police officers, he has been effectively deprived of his liberty and is no longer free to go about his business or pleasure. Occasions frequently arise when an ambiguous situation can best be clarified by asking a suspect to accompany a policeman to the nearest police station, where the matter may be investigated without attracting a crowd of inquisitive passers-by. It is a matter of great difficulty to determine, in subsequent proceedings against the police, whether the suspect was arrested or came of his own free will; for the answer depends upon the state of mind both of the police—what would they have done had the suspect refused or bolted?—and of the suspect. The opinion may be hazarded that, except in the case of a juvenile, the court would be slow to reach the conclusion that an arrest had been made in the absence of satisfactory evidence of the actual use of force or of threatening or abusive language on the part of the police or at least of words which made it clear to the suspect that he had no alternative but to accompany the officers. This view receives a measure of support from Lord Salvesen's opinion in *Muir*, 1910, 1 S.L.T. 164. (For the English authorities, see Halsbury's Laws of England under the heading "Trespass.")

The line sought to be drawn by police officers (usually detective officers) between arrest and "detention" is fictitious and has no justification in law. A suspect is equally under arrest whether he be detained in a waiting room or lodged in a cell. The practical question is—Is he free to walk out?

It is perfectly proper that the police should, as occasion demands, send for persons to attend at a police station for interrogation. The question whether, on or after arrival at the station, such persons are under arrest is to be resolved by the criterion above indicated.

Persons actually brought in for interrogation by police officers who seek them out and insist upon their attendance are to be regarded as having been arrested unless it was made clear to them that they remained free agents.

### The Use of Force in effecting Arrests.

The use of force in removing to a police station a person properly arrested is not by itself actionable. If, however, the arrest should be accompanied by unnecessary harshness towards the suspect or by a personal restraint uncalled for in the particular circumstances or if it is made in an offensive and arbitrary manner, such abuse of power may lay a foundation for an action of damages.

An arrest should be made as quietly as possible. While every precaution should be taken to see that the prisoner does not elude custody by a trick, any reasonable request by him—as that he should be allowed to put on outer clothing or that a nearby friend or relative should be informed—should be complied with. Naturally, the more serious the charge, the less will officers be disposed to take the risk of the prisoner bolting.

The following authorities are particularly instructive—*Young*, 18 R. 825; *M' Gilveray*, 1901, 8 S.L.T. 377; and *Hill*, 1906, 13 S.L.T. 731, in which Lord Dunedin said—"I have no doubt whatever that a constable is not to be allowed, in excess of his duty, to take advantage of his position and brutally assault a person who is rightly in his custody . . . . The averment here is really not sufficient to found a case of that class. The pursuer says he was held by the wrists and his arms were twisted; but these appear to me to be the ordinary circumstances of nearly every arrest; and I confess that the idea seems to me to be ridiculous that every pickpocket who is hauled along the street, by averring that the policeman twisted his arms a little further round than he need have done, should have, as a matter of right, an action of damages and a jury trial, in which twelve jurymen would be called upon to determine the precise angle of distortion at which the arms ought to be in taking a struggling man along a street. If, on the other hand, really serious violence is specifically averred, then that would be a case for allowing an issue"—i.e., a case to send to a jury.

To enable them to deal with unruly prisoners and as a means of self-defence, the police are provided with batons, carried in a specially constructed hip pocket. Batons should be used only in extreme cases, when, without resort to them, the arresting officer is in danger of being overcome. So far as is possible in the melee, the baton should be directed against the less vulnerable parts of the body.

In most police forces, handcuffs are not now generally carried and, except where necessary to convey prisoners from one jurisdiction to another, are rarely used. The legality of the use of handcuffs, in appropriate circumstances, has never been doubted.

*Angus* (page 68) asserts that "handcuffs or twitches should not be put on a person arrested on suspicion unless such person be a known violent criminal or attempt to run away." In the present writer's opinion, this limitation is over-strict. The use of handcuffs would be amply justified in any case of arrest for a really grave crime—more especially a crime of violence, such as murder, rape or robbery, and whether the arrest is made on the spot or by

officers detailed to execute a warrant—and in conveying a prisoner over any considerable distance from one jurisdiction to another. But there must be some good reason. In England it has been held that a prisoner handcuffed unnecessarily has a right to damages. (*R. v. Taylor*, 1895, 59 J.P. 393).

Apart from his duty to prevent his prisoner's escape and to look after his own safety, an arresting officer must see to it that the prisoner does not do harm to himself and that he does not, on his way to the police station or after arrival there, get rid of or destroy incriminating evidence.

#### **Arrest on Verbal Warrant.**

A magistrate (which term, in this context, extends to a judge, sheriff, justice or bailie) has drastic powers of immediate action in the event of the commission of crime within his jurisdiction. He may arrest, or order the arrest of, the offender (1) if he himself sees a crime committed or (2) if immediate complaint is made to him of "murder, robbery or like violent crime" by others who are sure of the facts and can identify the offender positively. (Macdonald's Criminal Law, 4th edition, page 289, and authorities there cited).

It follows that a constable is safe to proceed upon a verbal order from one whom he knows to be, or who can satisfy him that he is, a magistrate. Such an arrest is made not on the constable's, but on the magistrate's, responsibility. Angus, in his "Police Powers and Duties" (page 67), puts the matter thus (but without giving his authority)—"To the rule that a person making a charge against another person to a constable must specify the particulars relating to the charge as witnessed by him, there is one exception—viz., a verbal order to arrest given by a magistrate of the jurisdiction, which a constable is bound to obey though the grounds on which the order is given have not been made known to him; but when a magistrate, in virtue of his powers, orders an arrest without stating the grounds, he must accompany the constable to the police station of the district and there give his directions, in writing, as to the disposal or retention of the person arrested. In the event of an arrest so ordered being illegal, the magistrate is blameable and not the constable, except the order was so manifestly irrational as to shew that the magistrate was not at the time responsible for his actions or orders."

#### **Arrest on Written Warrant.**

A magistrate, on information of any crime or offence committed within his jurisdiction, may grant warrant to arrest. Nor is he confined to cases which he could competently try and punish;

a justice of the peace may issue a warrant for the arrest of a person suspected of murder. In modern practice, however, application for warrant to arrest any person suspected of a crime or offence not triable in a police or J.P. court is made to a sheriff-substitute ; and, except in circumstances of extreme urgency when a sheriff is not immediately available, this practice should be followed.

When a police officer wishes a warrant to arrest, he normally either submits to the appropriate prosecutor a written report of the facts or at once gets into touch with the prosecutor and informs him verbally of the circumstances. The prosecutor, if he is satisfied, prepares a complaint or (if the crime alleged is serious) a petition, which he signs. On presentation of this document to a bailie, justice or sheriff, as the case may be, the magistrate appends his signature—along with the date, which is indispensable. When this procedure is followed and for the reason that the application is made by a public official, it is unusual for the magistrate to make any enquiry into the facts. He is entitled to assume that the application is well founded, although it is equally within his competence to insist upon sworn statements.

If a prosecutor is not immediately available and if delay might result in the escape of the suspect or in the loss of material evidence, it is perfectly competent for the police to make a direct approach to a magistrate. In such case, the magistrate would be well advised to administer the oath to the applicant, who should depone to the facts within his knowledge, and also to the substance of any statements made to him by members of the public. If possible, signed statements by such persons should be produced. If at all convenient, the eye-witnesses themselves might appear before the magistrate and depone ; but this would not seem to be essential.

In addition to date and signature, a warrant to arrest must “as clearly as possible express the person to be arrested ; and although the crime charged is, where practicable, a proper addition, it is not indispensably necessary.” (Alison, volume 2, page 122). Where possible, the correct and full name, occupation and address of the suspect should be given. If these are unknown, the warrant should contain as full a specification as the known facts permit, so as to guard against the arrest of the wrong person. The issue of a general warrant to take into custody all persons suspected of the crime alleged is quite incompetent. The possibility of a mistake may be reduced or eliminated by adding some such phrase as—“recently a lodger with Mrs. Smith, 10 Blank Street.” Where full particulars cannot be given especial care must be taken by the arresting officer to see that the person apprehended is the person sought to be designed in the warrant.

While it is desirable that the granting of a warrant should be preceded by the presentation of a formal document, to which the warrant will be appended, a police officer would be safe to proceed upon a warrant written or typed on a slip of paper, bearing a magistrate's signature, dated, and designating the accused. The magistrate's signature should be followed by his style and quality (e.g., Justice of the Peace of the County of Midlothian), but (Alison, page 123) this is not indispensable. Thus—" Grants warrant to arrest John Smith, 15 Blank Street, Edinburgh, A.B." would be sufficient. But such extreme brevity is hardly to be commended.

In executing a warrant, a constable should inform the suspect of its substance and, if required, allow him to see it; but should not hand it to him and should be on his guard lest the suspect snatch the warrant from him and destroy it. (Should this happen, he would, in the writer's opinion, still be justified in making the arrest). The constable should warn the suspect that he need not say anything with reference to the charge, but that, if he does so, his statement will be noted and may later be used in evidence. (The words "against you" should not be added). If a statement is made, this should at once—or, if the prisoner's violence should prevent this, at the earliest possible moment—be noted verbatim.

A criminal warrant may be executed on a Sunday (*Maitland*, 24 D. 193) and at any hour; but, so far as the interests of justice allow, the disturbance of a household to effect the arrest of one of its members at night is to be avoided.

Cases arise where a suspect for whom a warrant has been issued is located by an officer who is aware of the warrant but does not have it with him. If it is likely that the suspect will abscond, he should be arrested.

#### **List of Statutory Powers of Arrest without Warrant.**

*Unlawful Drilling Act*, 1919, section 2.—(See, meantime, Defence (General) Regulations, 1939, 88C and second schedule).

*Salmon Fisheries (Scotland) Act*, 1828, section 11.—Authorises arrest of persons "found committing" offences.

*Railway Clauses Consolidation Act*, 1845, section 97.

*Police (Scotland) Act*, 1857.—See the comment, on page 73, on the general powers of arrest given by section 12.

*Naval Deserters Act*, 1847, section 9.—Power to arrest person reasonably suspected of belonging to Navy and of being a deserter or improperly absent from duty.

*Trespass (Scotland) Act*, 1865.—Power to arrest person "found committing" offence under the Act.

*Gun Licences Act, 1870, section 9.*—Constable may demand from any person using or carrying a gun (not being a person in the Services or in the police using or carrying a gun in the performance of his duty) production of a gun licence. On failure to produce a gun licence or a game licence and to permit constable to read it, constable may demand name and address. Refusal justifies immediate arrest.

*Tramways Act, 1870.*—By section 52, a power to arrest offenders evading payment of fares is given to tramway servants and all persons called by them to their assistance, if the offender's name or residence is unknown.

*Prevention of Crimes Act, 1871.*

Section 3.—Constable, with authority in writing from his chief, may without warrant take into custody convict on licence “if it appears to such constable that such convict is getting his livelihood by dishonest means.”

Section 7.—This section applies only to a limited class of criminals and only for seven years after the expiry of a sentence. In certain cases, a constable must have written authority from his chief, in others he may arrest without any express authority. The section should be carefully read for its express terms and the definition of “crime” in section 20 must be carefully noted.

*Pedlars Act, 1871, section 18.*—Pedlar refusing to show certificate, having no certificate, or refusing to allow or preventing or attempting to prevent opening and inspection of his pack, etc., may be arrested.

*Pawnbrokers Act, 1872, sections 34 and 49.*—In the circumstances set out in these sections, the pawnbroker may arrest and hand over the offender to the police.

*Parks Regulations Act, 1872.*—By section 8, a constable of the local force has, within a Royal Park or Garden, the powers of a park-keeper. By section 5, a park-keeper in uniform may arrest without warrant any offender who, in the park and within his view, contravenes the regulations, provided that the offender's name or residence is unknown to and cannot be ascertained by such park-keeper. Note that these powers apply only to parks under the Ministry of Works, not to ordinary public parks under the local authority.

*Explosives Act, 1875, section 78.*—Constable may arrest, without warrant, person found committing offence under the Act which tends to cause explosion or fire in or about a factory, magazine, store, railway, canal, harbour or wharf, or any carriage, ship or boat.

*Spirits Act, 1880.*—Section 146 gives power to any person to arrest persons hawking, selling or exposing to sale spirits otherwise than in premises licensed.

*Army Act, 1881.*

Section 154.—Constable may arrest person on reasonable suspicion that he is a deserter or absentee without leave. The procedure is detailed, under the heading "Army" in the concluding chapter.

Section 156.—Person found committing offence against this section may be arrested without warrant. The section penalises persons who buy, exchange, take in pawn, detain or receive or solicit or entice anyone to sell, exchange, pawn or give away or assist or act for any person in selling, etc., any arms, ammunition, equipment, instruments, regimental necessaries, or clothing issued for the use of officers or soldiers, or any military decorations, or any furniture, bedding, blankets, sheets, utensils and stores in regimental charge. An English Divisional Court held that a person found in possession of clothing bought by him from a soldier six days previously was "found committing." (*Laws v. Read*, 63 L.J.Q.B. 683).

The above sections apply to the Air Force and to Air Force property. (Air Force Act, 1917). As to the Navy, see the Navy (Pledging of Certificates) Act, 1914.

*Criminal Law Amendment Act, 1885, section 2.*—This section penalisesprocurement. By the C.L.A. Act, 1912, section 1, a constable may take into custody, without a warrant, any person whom he shall have good cause to suspect of having committed or of attempting to commit any offence against section 2 of the 1885 Act.

*Hawkers Act, 1888, section 6.*—Constable may arrest person found committing any offence against the section—i.e., hawking without a licence or hawking and not producing, upon demand by any person, a proper licence granted to him or his master. Note the definition of "hawker" in section 2 and the exemptions in section 3.

*Indecent Advertisements Act, 1889, section 6.*—Constable may arrest, without warrant, any person found committing offence against the Act.

*Regulation of Railways Act, 1889, section 5.*—Constable may arrest passenger failing to produce, or deliver up on request, ticket or to pay fare and refusing name and address.

*Penal Servitude Act, 1891, section 2.*—Constable may take into custody, without warrant, any convict on licence or supervisee whom he reasonably suspects of having committed any offence.

(As to arrest where licence revoked, see Criminal Justice Administration Act, 1914, section 26).

*Military Lands Act, 1892, section 17.*—Person offending against bye-law may be removed by any constable in manner provided by the bye-law from the area and taken into custody without warrant. (Vehicle, animal, vessel or thing may also be removed). (Section 17). This Act has been applied, with modifications, to the Air Force.

*Burgh Police (Scotland) Act, 1892.*—General powers of arrest are found in section 86 and in section 467. These powers are so widely phrased that, if read literally, they would justify arrest without warrant of any offender in any circumstances. In the opinion of the present writer, they should not be relied upon to justify any arrest which could not be justified independently of these sections. See *Peggie v. Clark*, 7 M. 89, in which similarly phrased powers under the Police (Scotland) Act, 1857, were commented on.

The Act of 1892 also contains express powers of arrest in relation to particular offenders—e.g., sections 409-411.

*Diseases of Animals Act, 1894, section 43.*—Where a person is seen or found committing, or is reasonably suspected of being engaged in committing, an offence against the Act, a constable may, without warrant, stop and detain him; and, if his name and address are not known to the constable and such person fails to give them to the satisfaction of the constable, may, without warrant, arrest him. The constable must forthwith make a report in writing to his superior officer of every case in which he stops any person (or any animal, vehicle, boat or thing) as empowered by this section. A person called by the constable to his assistance has like powers.

*Merchant Shipping Act, 1894, section 287.*—Empowers master or other officer of a steamer or any person called by him to his assistance (which would, of course, include a constable) to detain an offender against the section whose name and address are unknown to the master or officer.

*Licensing (Scotland) Act, 1903.*—The powers of arrest without warrant most commonly invoked are those under section 70, which empowers immediate arrest of (1) persons "drunk and incapable"; (2) persons drunk in charge of any carriage, horse, cattle or steam engine—but not of a motor vehicle, now covered by section 15 of the Road Traffic Act, 1930; and (3) persons drunk when in possession of loaded firearms. The *locus* covered is "any street, thoroughfare or public place, whether a building or not, or any licensed premises." "Public place" includes a railway station and any place to which the public have access, whether on payment

or not, and any public conveyance. The terms "carriage" and "cattle" have the same meanings as in the Burgh Police (Scotland) Act, 1892.

Additional powers of immediate arrest are found in section 67 (hawking exciseable liquors); section 68 (disorderly person refusing to quit licensed houses); and section 75 (person found drunk or drinking in a shebeen).

Note the absence of any express power to arrest a "drunk and disorderly" (who, however, might be arrested as a person committing a breach of the peace) or a person drunk in charge of a child.

*Musical Copyright Act, 1906.*—See section 1 (2) for arrest without warrant of persons selling or exposing or having in possession for sale pirated copies of musical works specified in authority addressed to a chief constable by the owner.

*Street Betting Act, 1906.*—Any constable may take into custody without warrant any person found committing an offence under the Act. (Section 1 (2)).

*Public Meeting Act, 1908*, as amended by the Public Order Act, 1936.—A constable reasonably suspecting a person of committing an offence under section 1 of the Act of 1908 (which penalises disorderly conduct directed to preventing business at a public meeting) may, if requested by the chairman, require the person to declare to him immediately his name and address. If he refuses or fails or is reasonably suspected of tendering a false name and address, the constable may without warrant arrest him.

*Prevention of Crime Act, 1908, section 15.*—Empowers arrest without warrant of a habitual criminal whose licence has been revoked and who has failed to return to prison. On arrest, he should be taken direct to prison.

*Official Secrets Act, 1911, section 6.*—The power of arrest without warrant given by this section is drastic, extending to any person found committing, or reasonably suspected of having committed or having attempted to commit or being about to commit, an offence under the Act (or the Act of 1920, which is to be construed along with that of 1911). This section is temporarily suspended—Defence (General) Regulations, 1939, 88 C.

*Protection of Animals (Scotland) Act, 1912, section 11.*—A constable may apprehend without warrant any person whom he has reason to believe (whether upon his own view or upon the complaint and information of any other person, who shall declare his name and place of abode) to be guilty of an offence under the Act punishable by imprisonment. This extends to all offences of cruelty under section 1.

*Prisoners (Temporary Discharge for Ill-Health) Act, 1913.*—A prisoner discharged temporarily under this Act may be arrested without warrant and taken back to prison if (1) he does not comply with the conditions or (2) he fails to return at the end of the period stated in the order.

*Criminal Justice Administration Act, 1914, section 26 (2).*—Where the licence of a convict has been revoked, any constable may arrest him without warrant.

*Aliens Order, 1920.*—Any person acting in contravention of the Order or reasonably suspected of having so acted or being about so to act may be taken into custody without warrant by an immigration officer or any constable.

*Dangerous Drugs Act, 1920.*—Any constable may arrest without warrant any person who has committed or attempted to commit or is reasonably suspected by the constable of having committed or attempted to commit an offence against the Act, if he has reasonable ground for believing that that person will abscond unless arrested or if the name and address of that person are unknown and cannot be ascertained by him. (D.D. Act, 1920, section 14).

*Road Traffic Act, 1930.*—Powers of arrest without warrant are conferred by section 15 ("drunk in charge"); section 20—driver of motor vehicle who, within the view of a constable, commits any offence under the provisions of the Act as to reckless or dangerous driving or careless driving, unless the driver either gives his name and address or produces his driving licence for examination; and section 28—person reasonably suspected of having committed or of attempting to commit offence under the section, which penalises taking and driving away a motor vehicle without the consent of the owner or other lawful authority.

*Public Order Act, 1936.*—A constable may without warrant arrest any person reasonably suspected by him of committing an offence against section 1, 4 or 5 of the Act. These sections penalise the wearing in public places or at public meetings of political uniforms; possession of offensive weapons at a public meeting or on the occasion of a public procession; and the use, in a public place or at a public meeting of threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned.

*Coinage Offences Act, 1936.*—Offenders against this Act may be immediately apprehended without warrant. The only exception is of offenders against section 8—making, possessing and selling medals resembling gold or silver coin, with respect to whom no power of arrest is given.

*Firearms Act, 1937.*—Section 6 empowers a constable to demand from a person whom he believes to be in possession of a firearm or ammunition (to which Part 1 applies) the production of a firearm certificate. If he fails to produce or to permit the constable to read the certificate, the constable may seize and detain the firearm or ammunition and require the person to declare to him immediately his name and address. A person refusing or giving a name or address which the constable suspects to be false or whom the constable suspects of intending to abscond may be arrested without warrant. Section 26 empowers a constable executing a search warrant to arrest without warrant any person found on the premises to which the warrant relates whom he has reason to believe to be guilty of an offence against the Act.

*Children and Young Persons (Scotland) Act, 1937.*—Powers of arrest without warrant appear in section 21 (vagrant preventing child from receiving education); section 24 (person committing within constable's view offence named in the First Schedule—see below—if the constable does not know and cannot ascertain his name and address; also person whom a constable has reason to believe to have committed such an offence if the constable does not know and cannot ascertain his name and address or has reasonable ground for believing that he will abscond); section 57 (juvenile, ordered to be detained on serious charge, whose licence has been revoked and who has failed to return to custody); section 82 (juvenile escaping from remand home—should be taken back to remand home); section 86 (juvenile who escapes from approved school or, being on leave or licence, runs away from person in whose charge he is, or fails to return on expiry of leave or on revocation of licence or, if on supervision when recalled); section 89 (juvenile who runs away from care of fit person).

The offences enumerated in the first schedule of the Act of 1937 are—any offence under the Criminal Law Amendment Act, 1885; any offence in respect of a child or young person which constitutes the crime of incest; any offence under sections 12, 13, 14, 15, 22 or 23 of the Act of 1937; and any other offence involving bodily injury to a child or young person.

*Defence (General) Regulations, 1939, No. 88C. and No. 18D.*—A constable, under Regulation 88 C, may arrest without warrant any person whom he has reasonable ground for suspecting to have committed any of the offences specified in the second schedule. That schedule enumerates—Treason, in so far as it consists of adhering to the King's enemies, giving them aid and comfort; an offence against the Treachery Act, 1940, murder, manslaughter; arson; trading with the enemy; offence against the Official Secrets Acts; offence under section 4 (2) of the National Service

Act, 1941; an offence against the Defence (General) Regulations; an offence against an order under part 1 or section 7 of the Air Navigation Act, 1920, as amended by the Act of 1936, or under section 12 of the Act of 1920, as amended by the Defence Regulations; an offence against the Unlawful Drilling Act, 1919; attempting or conspiring to commit, or aiding, abetting, counselling or procuring the commission of, or being an accessory to, any of the above offences. In Scotland, arson means fire raising and manslaughter means culpable homicide. (Regulation 101).

A constable may also (under Regulation 18D) arrest without warrant a person who, upon being questioned as to his identity or the purpose for which he is in the place where he is found, fails to satisfy the constable, if the constable has reasonable ground to suspect that the person was about to act in a manner prejudicial to the public safety or the defence of the realm. Such person may be detained pending enquiries, for not more than 24 hours except with the authority of a police officer not under the rank of inspector, nor for longer than 48 hours except with the authority of a chief constable. Even with such authority the maximum period is seven days and the chief constable must report to the Secretary of State.

Note also the machinery, under e.g., Regulation 18B, for the detention of persons under an order of the Secretary of State.

## CHAPTER IX.

## PROCEDURE AFTER ARREST.

WHAT is to be done with a suspect taken into custody by the police ? Having made such investigations as are possible on the spot, the officer must take his prisoner at once by the shortest route to the nearest police station or to the nearest police box to await the arrival of an ambulance. (*Morris v. Wise*, 2 F. and F. 51).

## Search.

Any person taken into police custody may be searched. Normally, this is done after arrival at the station and before placing the prisoner (if he is not to be at once admitted to bail) in a cell ; but where some special circumstance makes search advisable at the place of arrest, this would appear to be competent. (*Jackson*, 1897, 4 S.L.T. 277 ; *Bell v. Leadbetter*, 1934, J.C. 74). A less drastic course may serve the purpose—viz., to ask the arrested person to turn out his pockets. This would, for instance, meet the case of a shoplifter caught redhanded, provided that he can vouch his identity. It is desirable to discover what money the shoplifter has—could he have paid for the article stolen ? He should be asked to produce his money, on the convenient fiction that he has been arrested, searched and liberated to be reported for summons, all on the spot.

It is, however, illegal to search a suspect on the chance of finding evidence to justify his arrest. “ If the constable requires to make such a search, it can only be because, without it, he is not justified in apprehending and, without a warrant, to search a person not liable to apprehension seems palpably illegal.” (Per Lord Robertson in *Jackson*, cited above).

Wherever possible, a woman prisoner should be searched by a female searcher.

Articles found should be carefully set out on a counter in front of the prisoner and inventoried in his presence. To avoid later challenge, the inventory might be signed by the prisoner and counter-signed by the officer-in-charge ; but this precaution could apply only to sober prisoners. A clear differentiation should be made between items of purely personal property with no bearing on the charge and articles relevant to the issue or which point to a further crime. The former should be placed in a sealed envelope or other receptacle (on the back of which the inventory should appear) and should remain in charge of the officer-in-charge. To

the latter appropriate labels, bearing the signatures of witnesses who can connect them with the incident under investigation, should be attached. These "productions" should then be put in sole charge of some officer who is independent of the enquiry and kept by him under lock and key. Once the police report has been completed, either (1) the productions should accompany the report and be delivered to the prosecutor, or (2) if bulky, they should remain with the independent police custodian, who will now hold them on behalf of the prosecutor. In a petty case, to be finally dealt with at the police court next morning, the productions are sometimes attached to the police report. In any event, the main items of personal property should be shown in the report, which usually has an appropriate space; as should the productions—but under a separate heading. Such entries are often of great service to the prosecutor. Should it later be found necessary to remove for enquiry articles at first regarded as purely personal property, the envelope should be opened in presence of the officer-in-charge and the prisoner and, it is suggested, any necessary alteration in the inventory should be authenticated by both.

#### The Formal Charge.

As soon as may be after arrival at the police station—and in all cases without undue delay—the prisoner should be presented to the officer-in-charge. This officer must hear and assess the evidence available at this stage, applying to it a fresh and independent mind, and decide whether there is a *prima facie* case against the accused supported by legally sufficient evidence. (As already explained, where the charge is of a grave crime—e.g., murder—the prisoner should be detained even if, at that stage, corroboration is lacking).

The evidence of the witnesses should be taken "question and answer" and a careful note made of its substance. Witnesses should be brought into the charge-room one at a time and examined separately. They should not be put on oath; nor need their statements be signed. Police witnesses may be allowed to depone narrative—i.e., they may tell their story without interruption, except to clear up any doubtful point.

If not satisfied, the officer-in-charge may refuse the charge—in which case he should make a careful note in a special "Refused Charge" book of the testimony of the witnesses and of the reason for his refusal and liberate the prisoner. Before taking this step, he may, in a marginal case, communicate with the prosecutor (procurator-fiscal or burgh prosecutor, as the case may be), explain the position shortly and take his advice; or, instead of refusing the charge outright, he may resolve the difficulty by liberating

the prisoner after informing him that a report for summons is to be submitted and that he may hear more about the matter later on. There is, unfortunately, no Scottish procedure to correspond with the English practice of admitting an arrested party to bail to attend later at a police station if called upon. (Criminal Justice Act, 1925, section 45).

If satisfied that the prisoner should be detained, the officer-in-charge must caution him, charge him and note his reply verbatim. The writer has frequently been asked—Should a prisoner be cautioned and then charged or charged and then cautioned? He knows of no authority either way, but considers it better to start with the caution and then read the charge slowly and distinctly—thus (after taking name and other particulars)—“Now, listen carefully to me. Say nothing meantime. I am going to read out a charge against you. When I have done so, you will have an opportunity of saying anything you may wish to say. You need not say anything, but, if you do, it will be noted and may later be used in evidence.” Do not add the words “against you.” Having read over the formal charge, the officer may, unless the accused at once volunteers a statement, follow it by the question—“Well, do you wish to say anything?” Except to clear up, in accused’s interests, an ambiguity in his reply, there should be no further prompting or questioning.

So far as is possible at the stage which enquiries have reached, the charge should be specific as to time, place and nature of the act complained of. The forms given in the Criminal Procedure (Scotland) Act, 1887, schedule A, and the Summary Jurisdiction (Scotland) Act, 1908, schedule C, will be found useful. Where the charge is statutory, the words of the Act contravened should be echoed and the section added.

In light of the important discretion entrusted to the officer-in-charge, it is desirable that he should be of higher rank than that of the constables presenting the prisoner at the bar, and essential that, whatever his rank, he should be truly independent, free to exercise his discretion without fear of consequences. Where a station house keeper is liable to be overruled by a higher officer to whom the arresting officers have appealed against his decision, the main purpose of this important check on arbitrary action by individual police officers is frustrated. A station-house keeper should be answerable to the chief constable and to no one else.

Once a prisoner has been charged and searched, he should be removed from the charge-room and from the presence of the arresting or investigating officers and placed in a cell in charge of a disinterested turnkey. In 1925, a suspect arrested on a charge of murder was taken to a police station and there formally charged.

He was then allowed to remain sitting in the charge-room while the investigating officers busied themselves with sorting out "productions" and the writing up of statements. One of these officers—no doubt forgetting momentarily that the accused was still there—put to a colleague the question, "Was there a razor found among his property?" Accused then made a statement. At the trial, evidence of this statement was disallowed and the trial judge said—"What occurred shows how necessary it is, especially in murder cases, that a prisoner should be kept apart from the investigations of the police." (*H.M. Advocate v. Lieser*, 1926, J.C. 88).

A prisoner who has been "locked down" should be kept free from further interrogation by the investigating officers. The impropriety of such interrogation was strongly commented on by the High Court judges in *Stark and Smith v. H.M. Advocate*, 1938, J.C. 170. Stark and Smith had been arrested on a charge of stealing a number of skins. Later, in consequence of further information which had reached the police and which pointed to theft of a larger quantity, police officers went to the cell in which Smith was confined, explained that they had come into possession of certain consignments notes, cautioned him and asked if he had any explanation to offer. Smith said, "I might as well tell you the truth," and made a statement which amounted to an admission of theft of a large quantity of skins by himself and Stark. The officers then took Smith into the presence of Stark and, in presence of both, repeated Smith's statement. Smith added, "Yes, I have told everything." Stark said that he would make no statement until he had seen his law agent. At the trial, evidence of the statement made by Smith was admitted by the sheriff, who directed the jury that it was competent evidence against both accused. On appeal, the convictions of both accused were quashed on the ground that Smith's statement was inadmissible as evidence against either accused in respect that it had been made while under arrest and in reply to interrogation regarding the offence with which he had been charged. Lord Normand, who gave the leading judgment, said—"The idea of confronting one prisoner with another and using the statements already made by one prisoner against the other by repeating them in this fashion is wholly alien to the administration of the criminal law in this country."

#### The Treatment of Prisoners.

Suspects in police custody should at all times be treated with courtesy and fairness. No more force should be used towards them than is necessary to assert lawful police powers. The officer-in-charge should visit regularly all prisoners in the cells, receive and carefully investigate complaints made by them and

note their physical condition. Should he detect signs of illness, or should a prisoner complain of feeling unwell, immediate arrangements should be made to have the prisoner seen by a medical man or removed to hospital. Especial care should be taken in cases of advanced pregnancy or of persons who, arrested on a charge of drunkenness, have not regained consciousness after the lapse of, say, three hours.

A request for bail made to a turnkey should at once be communicated to the officer-in-charge.

While generally prisoners should be given facilities to communicate with relatives or friends, this cannot be made an absolute rule—e.g., it might be inadvisable where stolen property has not been recovered or where an accomplice is at large.

Foreigners should be allowed to get into touch with the embassy, legation or consular office of their country.

#### **Intimation to a Law Agent.**

Where a person has been arrested on a criminal charge (i.e., on a charge which will be dealt with on indictment) "such person shall be entitled immediately upon such arrest to have intimation sent to any properly qualified law agent that his professional assistance is required . . . and such law agent shall be entitled to have a private interview with the person accused before he is examined on declaration . . ." (Criminal Procedure (Scotland) Act, 1887, section 17).

Where the proceedings are to be summary, the right to have word sent to a law agent immediately on apprehension is conferred on an accused by section 15 of the Summary Jurisdiction (Scotland) Act, 1908—but only "if he so desires."

The better view is that in all cases where a serious charge is pending the police should pointedly inform the prisoner of his right. (*Goodall*, 2 White 1). In a recent case, Lord Moncrieff expressed the opinion that this should be done "at the very outset, before the making of the charge." (*H.M. Advocate v. Cunningham*, 1939, S.L.T. 401). This was the opinion of a single judge dealing with a charge of murder, and it may not be the last word on the matter; but, where the crime alleged is a grave one, the procedure suggested by Lord Moncrieff should, we think, be followed. Should the prisoner indicate a desire for a law agent, the proper course would then be to delay the preferring of a formal charge until the agent had arrived and had had time to advise his client. Where the charge is serious, and particularly if it is difficult to understand, and the accused are persons in poor financial circumstances, it should be made clear to them that they can have expert legal advice free of charge. (*Ferguson*, 1943, S.L.T. 82).

Once the law agent has arrived, he must be allowed to see his client in circumstances of absolute privacy. It is improper that a police officer should remain at the cell door within earshot. (*M'Cheyne*, 1941, J.C. 17). Where an arrest has been made for murder, arrangements should be made so that a turnkey, while remaining out of hearing, still keeps the prisoner in sight and is ready to intervene in the event of any untoward happening.

#### **Foreigners—Need for an Interpreter.**

The police must at all times treat prisoners with courtesy and scrupulous fairness. This duty applies with special force to the treatment of persons who cannot be expected to know their rights under our law or with whom normal communication is difficult. Expert assistance should be sought at the earliest possible stage. In dealing with a foreign suspect with an imperfect knowledge of our language, no vital step which might result in prejudice to the suspect—e.g., the formal charge—should be taken until a fully qualified and completely independent interpreter has arrived. (*Olsson*, 1941, J.C. 63). This rule applies less strongly where the charge is not serious or where the arrested person, although a foreigner, has a good command of English and has been here long enough to know something of his rights and of our procedure.

#### **Juveniles.**

No one under the age of eight can be the subject of criminal proceedings. (*Children and Young Persons (Scotland) Act, 1937*, section 55). A juvenile between eight and fourteen years ranks as a "child" (section 110). He can in no circumstances be sent to prison (section 56). A juvenile who has attained the age of fourteen and is under seventeen ranks as a "young person" (section 110). He may, in exceptional circumstances, be imprisoned (section 46). Normally, in dealing with a juvenile, the place of prison or police cells is taken by the Remand Home.

Section 39 of the Act of 1937 provides that "arrangements shall be made for preventing a child or young person while detained in a police station, or while being conveyed to or from any criminal court, or while waiting before or after attendance in any criminal court, from associating with an adult (not being a relative) who is charged with any offence other than an offence with which the child or young person is jointly charged, and for ensuring that a girl (being a child or young person) shall, while so detained, being conveyed or waiting, be under the care of a woman."

Section 40 provides that "where a person apparently under the age of seventeen years is apprehended, with or without warrant, and cannot be brought forthwith before a court of summary juris-

diction, a superintendent or inspector of police or other officer of equal or superior rank or the officer in charge of the police station to which he is brought, shall inquire into the case and may liberate him on an obligation that he will attend at the hearing of the charge being entered into by him or his parent or guardian or on bail being found by him or by his parent or guardian for such amount as will, in the opinion of the officer, secure his attendance at the hearing of the charge, and *shall* so liberate him unless—

- (a) the charge is one of homicide or other grave crime;
- (b) it is necessary in his interest to remove him from association with any reputed criminal or prostitute; or
- (c) the officer has reason to believe that his liberation would defeat the ends of justice."

Note particularly—that these provisions apply equally to children and young persons; that bail may be granted although the arrest was on warrant; that bail may be granted although the offence or crime is one not triable in a police court; and that the amount of bail is not restricted. Compare with the rules governing the admission of adults to bail. (See chapter 10).

Section 40 further enacts that where the juvenile is not liberated under the foregoing provisions he must be detained in a remand home (not in the cells) until he can be brought before a court unless the officer certifies (in writing)—

- (a) that it is impracticable to do so; or
- (b) that he is of so unruly a character that he cannot safely be so detained; or
- (c) that by reason of his state of health or of his mental or bodily condition it is inadvisable so to detain him.

The officer's certificate must be produced in court.

#### Females in Custody.

As we have seen, a woman arrested should be searched by a woman. So soon as may be after arrest, she should be put in the care of a woman. Where she has been taken to an out-station, the female searcher or a woman police officer should accompany her in the van to the main station, where she should be handed over to a female turnkey. If, thereafter, male officers have occasion to interview her, the turnkey should be within view throughout the interview. If the prisoner is to be photographed or finger-printed in another part of the building, the turnkey or a woman police officer should accompany the officers. Female prisoners should be kept apart from males in custody—so far as is practicable, in a different part of the building—e.g., on a separate flat.

### Fingerprinting, etc.

In Scotland (as distinct from England), the police have power to insist upon photographing and fingerprinting persons taken into custody on a serious charge at common law. (*Adair v. M'Garry*, 1933, J.C. 72). This power, in the present writer's opinion, should not be asserted against persons arrested on a statutory charge, no matter how serious; but may safely be applied to all arrests, whether of juveniles or adults, on charges of dishonesty, serious violence, indecent exposure or other act of gross indecency or crimes of like or greater seriousness. It is thought also to apply to a person arrested on a trivial charge, whether statutory or not, who is reasonably suspected of being implicated in some other charge of the nature indicated. This power is distinct from the powers possessed under statute by the prison authorities. (Prevention of Crimes Act, 1871, section 6; Prevention of Crimes Amendment Act, 1876, section 2; Penal Servitude Act, 1891, section 8).

It is important to note that the right to fingerprint and photograph — as also the rights against an accused's person noted below — are enforceable only against persons truly in custody of the police. It has no application to an accused who, having appeared before a court, has been allowed out on bail or on his word. (*Adamson v. Martin*, 1916, S.C. 319, read along with *M'Garry's* case).

Where a person who has been arrested, fingerprinted and photographed is subsequently acquitted by the court, the fingerprints and photographs should be destroyed (unless he already has a criminal record).

During the present emergency, the common law powers of the Scottish police have been reinforced and extended by article 15A of the Aliens Order, 1920, and the Persons in Custody (Photograph and Measurement) (No. 2) Rules, 1939.

### Other Rights against a Prisoner's Person.

The judges' opinions in *Adair v. M'Garry*, cited above, make it clear that the common law power of fingerprinting is a corollary to the general proposition that, in furtherance of their duty to investigate and detect crime, the police may take reasonable steps against the person of a suspect. They may, if need be, strip him to look for a birth mark or deformity, remove his clothing to examine it for stains, remove his boots to compare them with footmarks, search him for weapons or incriminating articles or compel him to take his place, clad as they think fit, in an identification parade.

### Identification Parades.

The detail of identification parades must necessarily vary with the facilities available. In the writer's experience, great ingenuity is exercised by the police in the interests of fairness in this connection.

In staging an identification parade, the following points should be heeded—

1. Wherever possible, at least four persons other than the accused should be paraded along with him. These persons should be of similar height, build and general appearance—e.g., clean shaven or otherwise, as the case may be. Their clothing should be similar to that worn by the accused—or, at least, not noticeably different—e.g., it would be improper to parade the accused in an overcoat and all others without one; or that the accused should wear a cap and all others soft hats. If the accused has some marked peculiarity—e.g., bright red hair—individuals with a similar peculiarity should be selected. The accused should be pointedly asked if he objects to any of the others and if he has any comment to make on the arrangements, and any reasonable suggestion on his part should be given effect to.

2. If the accused so desires, his solicitor may attend, but should be well warned that he must not intervene. The solicitor should be given an opportunity to comment on the selection of individuals or other arrangements, and any reasonable suggestion from him should be respected.

3. Apart from the accused and his solicitor, the only persons present (in addition to the witnesses) should be (1) the officer in charge of the station, who should be in sole charge of the parade; (2) the investigating officers—but only for the limited purpose of recording (as should the officer-in-charge) what happens—e.g., the fact that witness A at once walked up to the accused and said, "That's the man."

4. Accused should be allowed to select his position in the parade. After each witness has attended and left, he should be given further opportunity of taking up a fresh position in the line, if he wishes to do so.

5. The greatest care must be taken that witnesses who are to attend the parade should not have the slightest opportunity of seeing the accused, or any of the others who are to be lined up with him, before they enter the room where the parade is being held. To avoid this, all persons taking part in the parade should arrive at the station and be segregated at a time before that fixed for the arrival of witnesses. On arrival, witnesses should be taken to a room in a distant part of the building, from which they may be

escorted, in turn, to the parade room. No photograph of the person under arrest should be shown to any witness who is to attend at the parade; nor must any description of the accused be supplied to him. Nothing should be said to witnesses which would suggest that the guilty person is necessarily to be found among those paraded. The witnesses should be told that they are to be shown a number of men lined up in a row and that, if the person previously seen by them is among those men, they should point him out.

6. When witness A has attended at the parade and picked out, or failed to pick out, the accused, he should at once be escorted out of the building and sent home; or alternatively, taken to a separate room until the parade is over. He must not be allowed to converse with witnesses B, C and D, who are waiting to be called in, and should not be allowed within sight or hearing of them.

7. In the case of witnesses who are very young, it is quite proper that a parent, or other responsible adult, should attend with them; but such parent or adult should not intervene or "coach" the witness in any way.

8. Should a witness express a wish to see the persons lined up in the parade walk or lift their hats or act in some other way in which the guilty person acted at the material time, or to hear them talk, the officer-in-charge must instruct all (together or in turn, as may seem appropriate) to do so.

9. To avoid uncertainty, witnesses should be invited to touch any person picked out by them. Alternatively—to meet the case of the nervous witness—they may indicate the person by giving his number in the line—e.g., second from the left. In the latter event, the indication should be given in presence of accused, not after the witness has left the room. It is imperative that any words used by a witness—e.g., "That's like him"; "I think that's the man"—should be noted verbatim by the officer-in-charge and by the investigating officers.

10. A record should be kept of the names, ages, occupations and addresses of all persons taking part in the parade, and of their heights, dress and appearance.

#### GENERAL COMMENTS.

1. It is pointless to bring to an identification parade a witness to whom the police have previously shown a photograph of the suspect, as must sometimes be done—e.g., to enable a warrant to be applied for. The best procedure is to show the photograph to one only of a number of available witnesses, to apply for a warrant to arrest on the strength of his photographic identification and to summon to the parade staged after arrest only those witnesses

to whom a photograph was not shown. Should the case go to trial, the witness who saw the photograph will, of course, be asked to identify the accused in court.

2. It is equally pointless to bring to a parade witnesses who have already pointed out the guilty person to the police, if, within the view of those witnesses, the police at once arrested the suspect and took him to a police station. If, however, the suspect, after being pointed out, took to his heels and was lost sight of by the witnesses before the police found him again, or if he bolted from custody, attendance at a parade might supply evidence that the police arrested the right man.

3. Suspects arrested should not be taken to the houses of witnesses for identification.

#### **Presentation to a Court.**

Every person who has been arrested, whether on warrant or without warrant, "shall wherever practicable be brought before a court competent to deal with such case either by way of trial or by way of remit to another court not later than in the course of the first lawful day after such person shall be taken into custody, such day not being a day set apart for a general fast or a public or local holiday." (Summary Jurisdiction (Scotland) Act, 1908, section 23). This requirement applies to all persons detained in custody by the police, as distinct from those admitted to bail.

Apart from this express statutory requirement, there is a duty at common law "to take the party before a magistrate at the earliest practicable opportunity." (*M'Donald*, 1851, Shaw's Reports, page 516). Accordingly, overnight detention should be resorted to only where there is no reasonable alternative. If a person is arrested at mid-day and the preliminary formalities have been completed before the end of the local police court sitting that day, the preferable procedure is to present the accused to the court there and then rather than to hold him in the cells until next day.

#### **Charge Sheets.**

As we have seen, a person arrested without warrant must be brought to a police station, formally charged and either admitted to bail or committed to a cell to await the sitting of the local court next day. For the information of the prosecutor who will be called upon to present to the court a complaint or petition and, on a plea of guilty, to make a statement, a document is prepared by the officer accepting the charge. This document is variously known as a charge sheet, information, report or explanation. No stereotyped form exists for use throughout the Scottish forces.

In Edinburgh, where the form was carefully revised some years ago in consultation with the local prosecutor, the following details are given—Time of arrest and date; time of despatch of prisoner to main office; time of receipt of prisoner at main office; consecutive number in general charge book; whether drunk or sober when arrested; officer who first received the charge; apprehending officer; number of property bag at out station; number of property bag at main office; verification of name and address; family and financial circumstances; amount of money and property in possession, etc.; name and designation of prisoner; charge; witnesses; previous conviction. The spaces for these details, each consisting of a ruled panel, are followed by a blank space headed “Explanation,” which is used by the officer receiving the charge to set out a short summary of the main facts by which the charge is supported. Productions are separately noted and when bail is allowed a note is added of the amount, the source of the bail and the time of release.

Certain of these topics call for special comment—(1) *Drunk or Sober*.—The entry made under this heading should consist of the estimate of the arresting officers of accused's condition at the time of apprehension. Where, although accused is marked as sober, there are signs that he has been drinking, this should be stated in the body of the narrative. (2) *Verification of Name and Address*.—The practice in Edinburgh is to verify, as soon as may be after arrest, the name and address given by every prisoner with a fixed abode within the city. Lodging-houses are treated, for this purpose, as fixed abodes. The verification is effected by a personal call at the address given made by the constable on the local beat. Where the address tendered is outside the city, no verification is made. (3) *Family and Financial Circumstances*.—The particulars to be recorded are—married or single, widow or widower, number of children under 16 years, pensions, weekly wages and generally any particular which may enable a court to assess the means of the offender. (Criminal Justice Administration Act, 1914, section 42). If the prisoner is reluctant to supply particulars, he should not be pressed to do so. In such a case, the entry should be “Income refused” or, in appropriate cases, “apparently in good financial circumstances.” Special care should be taken to indicate straitened circumstances—e.g., widow living alone and entirely dependent upon her pension. (4) *Property*.—Under this heading, all private property in the prisoner's possession (except articles regarded as productions) is recorded. The chief purpose of this entry is to enable the court to know whether the accused can meet the fine which has been imposed or requires time to pay. Where accused indicates that money in his possession does not belong to him, that should be noted.

Where articles are found which have a bearing on the charge but are not required as productions, these should be underlined—e.g., matches in a case, under the Trespass (Scotland) Act, of sleeping in a stackyard or barn. (5) *Name and Designation of Prisoner.*—The particulars required are the full name, occupation, address (or “no fixed abode”) and age (or “age refused”). In the case of juveniles, especial care must be taken to record the correct age, so as to show whether the juvenile is a “child” or “young person,” and the name, etc., of the parent or guardian should appear. (6) *The Explanation.*—In the case of a “drunk and incapable,” where there are no unusual features, an explanation is unnecessary, provided that the charge has been fully detailed—“Was, at 10 p.m. on . . . . . found lying drunk and incapable on the footway in Blank Street.” In most other cases, a very short summary will suffice. It is rarely necessary, at this stage, to set down separate individual statements by the witnesses. If a plea of not guilty is tendered and the case adjourned for hearing at a future diet of the court, the prosecutor may then instruct the submission to him of individual statements. Where an accused has been arrested on warrant, an explanation will already be in the prosecutor’s hands and the charge sheet will be confined to the formal particulars and a note of what the accused said when formally charged.

## CHAPTER X.

## ADMISSION TO BAIL.

ALL crimes and offences except murder and treason are ultimately bailable ; but, where the crime or offence is of a serious nature, the question of bail cannot be raised until the accused reaches the sheriff court.

The power of the police to grant bail to adults is found in the Summary Jurisdiction (Scotland) Act, 1908, section 14. The special provisions relating to juveniles have already been dealt with.

Section 14 is in the following terms.—“Upon the apprehension of any person charged with an offence which may competently be tried before a court of summary criminal jurisdiction (other than the sheriff court) it shall be lawful for the chief constable, or other officer of police having charge in absence of the chief constable at any police office or station, to accept bail or deposit, by a surety or by such person, that such person shall appear for trial before such court, or before the sheriff court, at some time or place to be specified, and at all after diets of court, and to liberate the person so apprehended upon bail being found to an amount not exceeding twenty pounds or upon the deposit of any money or article of value to the amount of the bail fixed ; and the chief constable or other officer of police, if deposit be accepted, shall immediately enter the same in a book to be kept for the purpose, and grant an acknowledgment for the money or article so deposited, in which acknowledgment the time and place fixed for the accused’s appearance shall be set forth ; provided always that the chief constable or other officer of police may refuse, if he see cause, to accept bail in any shape ; and the refusal to accept bail or deposit, and the detention of the person so apprehended until the case of such person is tried in the usual form, shall not subject the chief constable or other officer of police to any claim for damages, wrongous imprisonment, or claim of any other kind whatsoever ; provided also that it shall be lawful to liberate any such person without bail, or to discharge him, if the chief constable or other officer of police deem it proper so to do.”

Several points require emphasis. (1) While the power to grant bail appears to apply to any person arrested, it may be doubted whether the release on bail of a person arrested on warrant is competent until he reaches the court which granted the warrant. This view draws support from the wording of section 23 of

the 1908 Act. See the fuller treatment of this point at the end of this chapter. (2) The power of the police to grant bail is confined strictly to persons charged with a "police offence"—i.e., with a crime or offence triable, to the point of verdict and sentence, in either a J.P. or a Police Court. If the charge is one triable only in the Sheriff or High Court, the offender must remain in custody until he reaches the Sheriff Court. It therefore becomes important that the police should be familiar with the precise jurisdiction of the courts. A special paragraph has been added below, under the heading "Police or Sheriff Court?" to meet this point. (3) The offender bailed out may be ordered to appear on some future date—which must, it is thought, be within a reasonable time—either at a J.P. court or at a police court or at a sheriff court. This provision is designed to meet the case where, although the crime or offence charged is triable in a lesser court of summary jurisdiction, it is desirable to have it tried by a sheriff—e.g., so that higher penalties may be exacted—see, as illustrative, the Street Betting Act, 1906, section 1 (1) (c). (4) The maximum bail which can be demanded at this stage is £20. In practice, an attempt is made to fix a sum roughly proportionate to the offence charged—say, 15s. for "drunk and incapable," £1 for "disorderly," £2 for theft, and so on—keeping in mind the personal circumstances of the accused. Where there are family circumstances, such as the presence of young children at home, making immediate release desirable, an easy bail may be fixed or the offender allowed out on his word. (5) Even where bail is competent, it may be refused and the refusal cannot be challenged. This point deserves some elaboration.

#### **Refusal of Bail (although competent).**

In deciding whether to allow bail (in a bailable case) the officer-in-charge of the police station may well be influenced by the following considerations—

- (1) The accused's condition. Apart from very special circumstances, no prisoner should be bailed so long as he is the worse of drink.
- (2) The probability of a renewal of the offence, especially where a person given in charge for assault is vowing vengeance.
- (3) The attitude of the complainant. Weight should be given to a statement by an assaulted woman that she will be in a state of terror if accused is liberated.
- (4) The possibility of intimidation of witnesses—e.g., in a case under the Immoral Traffic (Scotland) Act bail should rarely be granted; for there is always reason to expect that accused, if

released, will seek out and intimidate the woman who has given him away.

(5) The stage of the enquiry. Bail should normally be refused so long as the investigation is incomplete in a material respect. The prisoner may be required for an identification parade. It may turn out that the ultimate charge is one for the sheriff court only and therefore not bailable. If released at too early a stage, accused may frustrate the enquiry—by warning an accomplice, interfering with witnesses or putting stolen property, or articles of real evidence, beyond police reach.

(6) The likelihood of accused being responsible for other outstanding crimes. Officers other than the arresting officers may wish an opportunity of seeing him.

(7) In a case of assault, where there is likelihood of a fatal result. Generally, accused should be detained until the assaulted person is authoritatively stated to be out of danger.

(8) Where the case involves dishonesty, it may be desirable to keep him in order to send fingerprints to Glasgow and/or Scotland Yard. If he turns out to have two previous convictions for dishonesty, the case will be one for the sheriff and bail will be incompetent until he reaches the Sheriff Court.

#### **Police or Sheriff Court ?**

As already explained, it becomes important to know which crimes or offences are triable in, and which are beyond the jurisdiction of, a police or J.P.<sup>\*</sup> court. If the following rules are heeded little difficulty should arise.

(1) *Common law crimes.* Section 8 of the Summary Jurisdiction (Scotland) Act, 1908, makes it clear that a lesser court of summary jurisdiction is not to try—

(1) Murder, culpable homicide, robbery, rape, wilful fire-raising ;

(2) stoutlief, theft by housebreaking, housebreaking with intent to steal ;

(3) theft or reset or fraud or embezzlement to an amount exceeding £10 or aggravated by two previous convictions of dishonesty ;

(4) assault whereby any limb has been fractured, assault with intent to ravish, assault to the danger of life, assault by stabbing ;

(5) uttering ; coinage offences.

Neither an admonition nor a probation order rank as convictions for the purpose of this section.

*Examples.*

- A's record is (1) Admonished for theft.  
 (2) Probation for theft.  
 (3) Fined £1 for theft.

He can still be dealt with in a police or J.P. court and his next act of simple theft is bailable.

- B's record is (1) Fined £1 for theft.  
 (2) Fined £2 for fraud.

On his next arrest for dishonesty, B must go to the sheriff and cannot have bail.

(2) *Statutory contraventions.*—Everything turns upon the precise words used in the Act contravened. Neither a police nor a J.P. court can claim jurisdiction over a statutory contravention except where such jurisdiction is conferred expressly or by the clearest implication. The phrase "on summary conviction" is not enough (*M'Pherson v. Boyd*, 1907, 5 Adam 247); but where a statute imposes penalties on persons convicted "before a court of summary jurisdiction," that phrase operates to enable either a police or a J.P. court to try the offence. (*Hall v. Macpherson*, 7 Adam 173). In certain cases, jurisdiction may be conferred on a justice or magistrate by a later Act; thus, section 143 of the Burgh Police (Scotland) Act, 1892, gives power to try in a police court contraventions of the Criminal Law Amendment Act, 1885, "in so far as it relates to the suppression of brothels." In other cases, the jurisdiction over contraventions of a particular Act is divided—e.g., the Road Traffic Act, 1930, permits of police court proceedings where the penalty exigible does not exceed £20 but reserves more serious contraventions (e.g., "drunk in charge") for the sheriff.

The sheriff court, on the other hand, is a "court of universal jurisdiction" (*M'Millan v. Grant*, 1924, J.C. 13). It may try any offence unless its jurisdiction is excluded by statute, expressly or by clear implication. (*Wilson v. Hill*, 1943). Even where an offender under a particular statute is liable to penal servitude (which sentence is the prerogative of the High Court of Justiciary) it is now competent to restrict the penalty to one of imprisonment and raise proceedings before the sheriff. (Criminal Procedure (Scotland) Act, 1938, section 10).

Keeping these rules in mind, a list may be compiled of (1) statutory contraventions triable by a magistrate in a police court and (2) contraventions triable only by a sheriff. The lists given below are not exhaustive but may prove a useful guide.

### **Contraventions Triable in a Police Court.**

Contraventions of the following may be tried in a police court (and, of course, equally well in a sheriff court)—

The Vagrancy Act, 1824, section 4 ; the Trespass (Scotland) Act, 1865 ; the Prevention of Gaming (Scotland) Act, 1869 ; the Tramways Act, 1870 ; the Prevention of Crimes Act, 1871 ; the Pedlars Act, 1871 ; the Dogs Acts ; the Pawnbrokers Act, 1872 ; the Criminal Law Amendment Act, 1885, in so far as it relates to brothels ; the Burgh Police (Scotland) Acts ; the Diseases of Animals Acts ; the Merchant Shipping Acts, except where the offence is declared to be a felony or misdemeanor ; the False Alarm of Fire Act, 1895 ; the Immoral Traffic (Scotland) Act, 1902 ; the Licensing (Scotland) Acts ; the Street Betting Act, 1906 ; the Gaming Machines (Scotland) Act, 1917 ; the Ready Money Football Betting Act, 1920 ; the Road Transport Lighting Act, 1927 ; the Betting (Juvenile Messengers) Act, 1928 ; the Slaughter of Animals Act, 1928 ; the Petroleum (Consolidation) Act, 1928 ; offences under the Road Traffic Acts, where the penalty is not over £20 ; certain offences under the Children and Young Persons (Scotland) Act, 1937 (see sections 28 to 31) ; the House to House Collections Act, 1939, but only where the maximum penalty is not over £10.

### **Contraventions Triable only in the Sheriff Court.**

All the above offences may, and the following *must*, be taken before a sheriff—

Contraventions of the Explosive Substances Act, 1875 ; the Indecent Advertisements Act, 1889 ; the Prevention of Corruption Act, 1906 ; the Post Office Acts ; the Protection of Animals (Scotland) Act, 1912 ; the Official Secrets Acts ; the Shops Acts ; the Dangerous Drugs Acts ; the Aliens Order, 1920 ; the Road Traffic Acts, where the penalty exceeds £20 ; the False Oaths (Scotland) Act, 1933 ; the Betting and Lotteries Act, 1934 ; the Coinage Offences Act, 1936 ; the Public Order Act, 1936 ; the Methylated Spirits (Sale by Retail) (Scotland) Act, 1937 ; certain offences under the Children and Young Persons (Scotland) Act, 1937 ; the Firearms Act, 1937 ; the Prevention of Violence Act, 1939 ; the Trading with the Enemy Act, 1939 ; the House to House Collections Act, 1939, where the penalty is over £10 ; the Defence Regulations.

### **Arrest on Warrant—Is Bail Competent?**

When an offender has been arrested on warrant in respect of a charge triable in a police court, may he be admitted to bail ? In most cases this question is purely academic ; for the issue of a

warrant to arrest usually means that one is dealing with a person who has no fixed residence or who would be unlikely to attend court voluntarily ; but cases do arise in practice in which it becomes apparent, after execution of the warrant, that the arrested person is a respectable citizen with an established address or even that there are circumstances (such as the presence of young children in the house) which make it undesirable to keep him in custody. Is bail then competent ?

Section 14 of the Act of 1908 (quoted in full at the beginning of this chapter) applies in terms to any apprehension and appears to empower the police to grant bail, in appropriate cases, whether the arrest has been without warrant or on a warrant. On the other hand, it is at least arguable that if a magistrate has gone the length of issuing a warrant to arrest, he will expect the police to detain the offender until he can be brought before the court. This point of view is reinforced by the terms of section 23 of the Act of 1908—"A warrant of apprehension shall imply warrant to officers of law to search for and apprehend the accused and to bring him before the court issuing such warrant, or before any court competent to deal with the case, . . . . and, in the meantime, until he can be so brought, to detain him," etc. Possibly the best procedure, where bail seems desirable for some particular reason in the case of a person arrested on warrant, is that the police should get into touch with the prosecutor on whose application the warrant was issued and take his instructions.

In England, this question is neatly avoided by the practice, for which there is no Scottish equivalent, of endorsing a warrant for bail in appropriate cases.

## CHAPTER XI.

## THE POLICE AND THE CRIMINAL COURTS.

As we have seen, it is the duty of the police to detect and investigate violations of the law, and having, in the exercise of an honest judgment, pinned some crime or offence to a particular individual, to take steps, by arrest or report for summons, to make the suspect available to a criminal court. In carrying out these duties, the police are acting as the servants of justice.

In certain other ways, the police act more immediately as the servants or officers of the criminal courts and so facilitate the administration of justice. This they may do (1) by arresting locally offenders in respect of whom a warrant has been issued by a local magistrate, justice or sheriff; (2) by arresting locally a person in respect of whom a warrant has been issued by a magistrate, justice or sheriff in some other burgh or county in Scotland and by handing over the offender to an escort arriving from the jurisdiction issuing the warrant in possession of a warrant to arrest —properly indorsed in the cases in which indorsation is required by law; (3) by arresting locally an offender in respect of whom a criminal warrant has been issued by an English court and by handing him over to the escort from England on presentation by them of a warrant duly indorsed; (4) by circulating to other forces the information that a particular individual, of whom a description will be supplied, is wanted on warrant; (5) on receipt of information that such individual has been arrested by another force in Scotland or England, by dispatch of officers armed with the warrant to arrest and, where indorsation is necessary, with a declaration of handwriting, as later explained; (6) by serving upon individuals resident locally summonses (complaints) issued either by local courts of summary jurisdiction or by such courts in other parts of Scotland or in England and by making out an execution of service, as later explained, and sending this to the police force instructing the service; (7) by serving indictments; (8) by citing witnesses; (9) by the keeping of records of previous convictions and of a daily court roll book; (10) by making arrangements for the orderly appearance before the court of persons to be dealt with on a particular day; (11) by maintaining order in court; and (12) by themselves giving evidence in the witness box as occasion may require.

### The Backing of Warrants.

The general rule is that a warrant to arrest has no legal effect beyond the bounds of the territory of the magistrate who has issued the warrant. To make it effective, it must be backed (indorsed) by a magistrate of the jurisdiction within which it is to be enforced. To this rule there are important exceptions—see below. In practice, arrests of wanted persons are usually made by the police of the county or burgh in which the person is located, on information from the police of the jurisdiction issuing the warrant, at a time when the warrant has not yet been indorsed. The subsequent backing of the warrant should then be made a condition of the handing over of the prisoner by the arresting force to the officers who arrive as an escort from the issuing jurisdiction.

Provided that the arrest is to be made within Scotland, *no backing is required* (1) for a warrant of the High Court of Justiciary, (2) for a warrant of a Scottish court of summary jurisdiction, (3) for a warrant issued by a sheriff against a person charged with having committed a crime within his jurisdiction if executed by a messenger-at-arms or an officer of the court of the sheriff granting the warrant, who may be a constable sworn in for the execution of criminal warrants. (1 and 2 Vict., c. 119, section 25). A special concession is made to constables in the Border counties (Northumberland, Cumberland, Berwick, Roxburgh, Dumfries) by the Police (Scotland) Act, 1857, section 11.

*Backing is essential* in the case of (1) all Scottish warrants to arrest which are to be enforced in England, (2) all English warrants to arrest which are to be enforced in Scotland, and (3) "solemn" (as distinct from summary) warrants to arrest issued by a Scottish sheriff which are to be enforced within Scotland but outside the jurisdiction of the sheriff signing the warrant—unless, as rarely happens, the warrant is to be executed by a messenger-at-arms or an officer of the court granting the warrant. In practice, this last requirement of backing is widely, if unwisely, ignored.

### ILLUSTRATIONS.

(1) The judge of police in Edinburgh Burgh Court grants warrant for the arrest of A. B. on a summary charge. No backing is necessary if A. B. is located within Scotland; but if A. B. is found in England the warrant must be indorsed.

(2) The Sheriff of Lanarkshire at Glasgow grants warrant for the arrest of C. D. on a charge which is to be dealt with on indictment. C. D. is located in Wick. Strictly, the warrant should

be indorsed unless it is proposed to have it executed either by a messenger-at-arms or by an officer of Glasgow Sheriff Court. In practice, indorsation is rarely insisted upon.

### Backing a Warrant—Procedure.

The procedure to be followed to procure the backing of a warrant may best be explained by following out the steps in a simple case. Imagine that a warrant has been issued by the judge of police in Edinburgh Burgh Court for the arrest of A. B. There is reason to think that A. B. has absconded to York. The police there are communicated with, locate A. B., take him into custody, and inform Edinburgh. An officer of the Edinburgh City Police is dispatched to York to bring the prisoner back to Edinburgh. This officer must take with him the warrant to arrest. On arrival at York, he is taken before a justice and there depones on oath to the handwriting of the magistrate issuing the warrant. The warrant is then indorsed. The indorsed warrant is presented to the officer in charge of the station where the prisoner has been detained; the prisoner is handed over and conveyed to Edinburgh for appearance, as soon as possible, before the court issuing the warrant.

The form of backing is in the following terms—"Whereas proof upon oath hath this day been made before me, one of His Majesty's justices of the peace for the County of . . . . that the name of A. B. to the within warrant subscribed is of the handwriting of the justice of the peace (or sheriff or magistrate, as the case may be) within mentioned, I do hereby authorise C. D., who bringeth to me this warrant and all other persons by whom the same may be lawfully executed and also all constables and other peace officers of the said County of . . . . to serve and execute the same within the said last-mentioned county. Given under my hand this              day of              19." (Summary Jurisdiction (Process) Act, 1881; Schedule and Indictable Offences Act, 1848, Schedule (K)).

An alternative procedure is that the officer who proposes to go to England for the prisoner first takes his warrant before a magistrate, justice or sheriff (as the case may be) in the burgh or county in which the warrant was granted and there makes a declaration of handwriting, with which (and the warrant) he proceeds to England. On his arrival at the place where the prisoner is detained, the warrant will then be indorsed without the need for the appearance of the officer before the justice, to whom it will be produced, along with the declaration, by a local officer.

A third alternative, rarely adopted, is that, before the arrest of the suspect in England, the Scottish warrant along with a completed declaration of handwriting should be sent to the police in the

English burgh where the suspect is believed to be ; that the warrant should be indorsed by a justice on production of the declaration of handwriting by an officer of the English force concerned, and the suspect arrested and later handed over to the Scottish escort on its arrival.

The form of declaration of handwriting adopted in the case of the two latter alternatives varies. In Edinburgh, a declaration in the following terms is used—"I, . . . . ., of the Edinburgh City Police, do solemnly and sincerely declare that the name of . . . . . subscribed to the warrant to apprehend dated . . . . . on the foregoing petition, is of the handwriting of . . . . . sheriff-substitute of the Lothians and Peebles at Edinburgh and I make this solemn declaration conscientiously believing the same to be true." This declaration is made before a sheriff-substitute. The deponent signs and the sheriff-substitute countersigns—"Declared at Edinburgh this . . . . day of . . . . 19 . . . before me.

*Sheriff-Substitute of the  
Lothians and Peebles.*

The variations of procedure referred to are of no great significance, so long as the essentials are observed. The main point is that the police force holding the prisoner should not part with him (in cases where indorsation is required by law) without the production to them, at some stage, of a duly backed warrant. This serves to vouch the identity of the escort and to throw the responsibility upon the issuing court.

In the opinion of the present writer, it is extremely doubtful whether, in any circumstances, a person against whom a warrant to arrest and commit to prison has been issued by an English court can be incarcerated in a Scottish prison and serve his sentence there. Some time ago, it is understood, a contrary opinion was expressed and acted upon where a warrant against a person then resident in a Scottish burgh was issued by English justices under the powers contained in the Summary Jurisdiction (Married Women) Act, 1895. The argument would appear to have been that the payment of a sum of money directed to be paid by the Act of 1895 "may be enforced in the same manner as the payment of money is enforced under an order of affiliation" (section 9); that this brings the enforcement within the scope of section 6 of the Summary Jurisdiction (Process) Act, 1881, which allows any process issued in England to enforce obedience to a bastardly order to be "endorsed and executed in Scotland in manner provided by this Act with respect to process of a court of summary jurisdiction." In the writer's opinion, that provision is to be read subject to the overruling provision, in section 5 of the Act of 1881, that "where a

person is apprehended under process executed in pursuance of this Act, such person shall be forthwith taken to some place within the jurisdiction of the court issuing the process and be there dealt with as if he had been there apprehended." This would seem to dispose of the suggestion which has been made from time to time that persons failing to pay a fine imposed by a court of summary jurisdiction in one of the two countries should serve his sentence in a prison in the other.

The whole position is extremely confused. There would seem to be no really valid practical reason why (1) process issued in England (or Scotland) should not be served and executed in Scotland (or England) without the need for indorsation—the service being authenticated by a document on the lines of the Scottish execution of service and (2) a person resident in one part of the United Kingdom, arrested on a warrant of committal issued by a court of summary jurisdiction in another—especially a remote—part should not be committed to the prison nearest to the point of arrest. What useful purpose can be served by arresting a man in Southampton on an Edinburgh warrant committing him to prison, intimating the arrest to Edinburgh, causing an escort to travel from Edinburgh to the south of England and back at the public expense, lodging the prisoner in Saughton prison to serve a sentence of a few days or weeks which could just as effectively have been served in the south, and then releasing him in Edinburgh, to find his own way home? (One can, of course, see the point of bringing him back if there is still a question for the court to determine—as where the warrant to arrest has been issued because of accused's failure to attend court). Clearly, amending legislation to clarify and simplify the procedure is long overdue.

### **The Service of Summons.**

The great majority of offenders who appear before courts of summary jurisdiction are at no time in police custody. When a relatively trivial offence is alleged to have been committed by a citizen of good character and fixed abode, the need to arrest, either at the time or later on warrant, does not arise. Instead, the suspect is reported for summons to the prosecutor of the appropriate court of summary jurisdiction, who, having decided to take proceedings, prepares a complaint (summons), which he signs and presents to the clerk of the court. The clerk assigns a diet for the hearing of the case; that is to say, in effect he issues a warrant to officers of law to cite the offender to appear in court at a particular time on the day fixed for the hearing. The complaint, together with a copy for service, is then handed to the police (in a large force to the Inspector of Court) so that they may

effect service on the offender. The term "officer of law" includes any constable (Summary Jurisdiction (Scotland) Act, 1908, section 2). In Scotland, the terms "summons" and "complaint" are interchangeable.

Citation is effected by handing a copy of the complaint to the accused personally or by leaving it for him at his dwelling-house or place of business with some person resident or employed therein or, if he has no known dwelling-house or place of business, by leaving it at any other place in which he may at the time be resident (e.g., a lodging-house or hotel). A master of or seaman or person employed in a ship or vessel may be cited by leaving the copy summons "in the hands of a person on board thereof and connected therewith." A company, association or incorporation may be cited by leaving the copy summons "at their ordinary place of business in the hands of a partner, director, secretary or other official thereof or . . . in the same manner as if the proceedings were in the civil court." A body of trustees may be cited by serving a complaint on any one of their number resident in Scotland or on their known law agent there. (Summary Jurisdiction (Scotland) Act, 1908, section 21).

The concession made, in the case of a company, in favour of service "in the same manner as if the proceedings were in the civil court" presumably makes available the methods of citation to be found in the Sheriff Courts (Scotland) Act, 1907, first schedule, rule 11 (which, *inter alia*, allows service at the principal place of business or, where the principal place of is outwith the jurisdiction, at any place of business within the jurisdiction and includes, under the term "place of business" the office or place of business of the clerk or secretary of any board or corporation). *Query*—Whether it also makes available the service of a summons by posting it to the company's registered office—see the Companies Act, 1929, section 370.

A constable to whom a copy summons has been handed for service should (1) peruse it, to make sure that it is a complete copy of the original, including any schedules; (2) check the *induciae* (see below), especially in cases where the statute contravened insists upon a special *induciae*; (3) in the case of Road Traffic offences, see that the requirements of section 21 of the Road Traffic Act, 1930, have been met, and, in other cases, keep in mind that the statute contravened may fix a special time within which the complaint must be served (see below); (4) in the case of Food and Drugs prosecutions, see that a copy of the analyst's certificate is attached and that not more than twenty-eight days have elapsed between the purchase of the sample and the institution of proceedings (Food and Drugs (Adulteration) Act, 1928, section 27); and, should he detect any irregularities or failure to comply with

the law's requirements, call the attention of the prosecutor to these before going out with the copy complaint. Having satisfied himself that the document is in order, the constable should complete and sign the notice of compearance printed on the back. He should inform the prosecutor of any difficulty experienced in effecting service and also of any substantial point raised by the accused, or by someone on his behalf, at the time when service is effected (e.g., an indication may be given that the accused is to be away on business on the date fixed for the hearing).

Service of complaints should be effected as quietly as may be, without attracting the attention of neighbours, fellow residents or fellow employees—preferably by officers in plain clothes. Resort should be made to service at accused's place of business only when the constable has failed to locate him elsewhere. Where the accused is resident in a hostel, lodging-house or the like, why not put the copy summons in an envelope addressed to the accused and impress upon the person accepting it the need for handing it to the accused personally immediately on his return? Wherever possible, personal service should be effected. Failing that, the copy summons should be left with a responsible person with precise instructions to see to its delivery.

The *induciae* is the period elapsing between service of the complaint and the first calling of the case in court. In the normal case, this interval must be at least 48 hours, so as to give an accused fair time to make arrangements for attending court and instructing his defence; but in special circumstances (e.g., where the accused is a seaman about to sail) a court has power to fix a shorter *induciae*. (*Summary Jurisdiction (Scotland) Act, 1908*, section 21). Certain statutes insist that offenders against their terms shall have longer notice. Instances are—the *Food and Drugs (Adulteration) Act, 1928*, which, by section 27, enacts that the summons "shall not be made returnable in less than 14 days from the day on which it is served," and the *Licensing (Scotland) Act, 1903*, which, by section 92, insists upon an *induciae* of six clear days in cases of breach of certificate.

A point to keep in mind is that summary proceedings in respect of a statutory contravention must be instituted (i.e., the diet must be fixed—*Robertson v. Page, 1943, S.L.T. 145*) within 6 months of the contravention. (*Summary Jurisdiction (Scotland) Act, 1908*, section 26). Certain statutes prescribe shorter and certain others longer periods within which proceedings must be raised against persons alleged to have contravened their terms. For instance, where a sample has been purchased for test purposes under the *Food and Drugs Acts*, any prosecution in respect of the sale must be instituted within 28 days of the purchase. (*Food*

and Drugs (Adulteration) Act, 1928, section 27); a summons for "speeding" or careless or reckless driving under the Road Traffic Acts must be served within 14 days of the commission of the offence unless one or other of the alternatives in section 21 of the Road Traffic Act, 1930, has been followed; and many other special statutory provisions are to be found.

A constable serving a summary complaint need not be accompanied by a witness. If it should prove necessary to satisfy the court that citation has been made, this may be done either by the constable's oath in court or by production of his written execution. (Summary Jurisdiction (Scotland) Act, 1908, section 25). A form of execution is given in schedule D of the 1908 Act.

A summons issued by a Scottish court of summary jurisdiction runs throughout Scotland without indorsation. Service out of Scotland is regulated by the Indictable Offences Act, 1848, the Indictable Offences Amendment Act, 1868, and the Summary Jurisdiction (Process) Act, 1881—Summary Jurisdiction (Scotland) Act, 1908, section 25. When, therefore, it is proposed to cite before a Scottish summary court an offender now in England, the police in the jurisdiction of the Scottish court issuing the summons must send to the police of the jurisdiction in which the offender is now to be found (1) a principal complaint, (2) a copy complaint, duly completed, and (3) a declaration of handwriting, as already explained in connection with warrants to arrest. In the same way a summons issued by an English court of summary jurisdiction will be served upon an offender in Scotland by the local police on receipt of a principal and copy summons and a declaration of handwriting. Before service, an indorsation must be procured from a local magistrate, justice or sheriff. The magistrate, justice or sheriff must indorse a summons which is, on the face of it, in order and accompanied by a declaration of handwriting and cannot apply his mind to the merits of the prosecution. (*Murphy v. Brooks*, 1935, S.L.T. 168).

The Act of 1881 applies to a process issued to enforce obedience to a bastardy order (section 6), but not to "any process requiring the appearance of a person to answer a complaint if issued by an English court of summary jurisdiction for the recovery of a sum of money which is a civil debt within the meaning of the Summary Jurisdiction Act, 1879" (section 4 (4)). An English distress warrant, when indorsed, "shall be executed in Scotland as if it were a Scotch warrant of poinding and sale" (section 5)—i.e., by a sheriff officer. (But see section 11 (2) of the Money Payments (Justices Procedure) Act, 1935, which authorises the execution of a warrant issued under that section in any part of the United Kingdom "as if it had been a warrant of arrest issued under section 2 of the Summary Jurisdiction Act, 1848").

The Scottish police have found great difficulty in determining whether summonses issued by English courts of summary jurisdiction are civil or criminal. In cases of doubt, they are advised to consult the local sheriff clerk and to communicate his decision (if adverse to indorsation) to the English force instructing service. The definition of civil debt contained in the Summary Jurisdiction Act, 1879 (a purely English Act), is found in section 6—"where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt." To those unfamiliar with English procedure, this may serve only to make confusion worse confounded.

Although the machinery of the Act of 1881 applies, as has been stated, to a process issued to enforce obedience to a bastardy order, it cannot be applied where the English court had no initial jurisdiction. This position arises where the person against whom the process is directed is a domiciled Scotsman resident in Scotland —see *Macqueen*, 1920, 2 S.L.T. 407, and the cases there cited.

### **Proof of Citation.**

Occasions arise (e.g., on the failure of an accused to appear in court in response to a complaint served upon him) when it is necessary to prove to the court that legal citation has been made. When the citation proceeds upon a complaint issued by a Scottish court and is effected within Scotland, the court will be satisfied by either the oath of the officer of law who served the complaint or the production of his written execution, which should follow the form given in schedule D of the Summary Jurisdiction (Scotland) Act, 1908.

### **Service of an Indictment.**

As we have seen, the charge in a summary prosecution is embodied in a complaint or summons which (when arrest is not resorted to) must be served upon the accused by an officer of law. In solemn procedure—i.e., where the trial is to take place before a judge of the High Court of Justiciary or a sheriff sitting with a jury—the corresponding, though more elaborate and formal, document, is an indictment running at the instance of the Lord Advocate and having appended to it lists of the productions and Crown witnesses. In order to inform the accused of the precise charge and of the time and place of the pleading diet and trial, a copy of the indictment must be served upon him. Except when the accused is still in prison (in which case service is made by a prison official) a police officer is among the persons who are authorised to serve an indictment. (*Criminal Procedure (Scotland) Act, 1887*,

section 24). This he does by handing to the accused personally, or leaving at the "domicile" specified in his bail bond (usually his agent's office) a copy of the indictment and lists with citation attached. Forms of citation are given in schedules F and G of the 1887 Act. The citation must be signed by the officer effecting service and by a witness. When accused has, in terms of section 31 of the Act, intimated his intention to plead guilty, a slightly different form of citation is used (schedule L) and no witness is required and, in that case, notice is not given of Crown witnesses and productions other than productions necessary to prove previous convictions. In the rare contingency of accused being neither in prison nor on bail, service is made personally, if accused can be found; if not, by leaving the service copy indictment at his house in the hands of a servant or member of the family or, if access is impossible, by fastening it to the "most patent door." If accused has absconded, service is made at his last known residence.

A form of execution of citation is given in schedule C of the Act of 1887.

#### Citation of Witnesses.

It is the duty of the police to cite to court (1) all prosecution witnesses and (2) witnesses for the defence whose names and addresses have been supplied by the accused or his agent. In summary courts, citation is regulated by section 21 of the Summary Jurisdiction (Scotland) Act, 1908. The citation may be delivered to the witness personally or left for him at his house or place of business with a resident or employee or, if he has no known house or place of business, it may be left at "any other place in which he may at the time be resident" (e.g., a lodging-house). A witness cannot claim, as an accused normally can, an *induciae* of 48 hours, but every effort should be made to give him fair and ample notice of the hearing. Forms of citation and of execution of service are given in schedule D of the Act of 1908.

Constables are among those who may competently cite witnesses to a "solemn" court. (Criminal Procedure (Scotland) Act, 1887, section 24).

When a witness is in prison, his presence at court is secured by applying to the court for warrant to officers of law to bring him from prison (in his own clothes) and to return him when the purpose is served. A form of petition to the sheriff is given in Renton & Brown's Criminal Procedure, 2nd edition, page 314. Where the witness was committed to prison by another court, the prison authorities insist upon a counter signature by a judge of that court. For instance—A. B. is sent to prison by a sheriff.

While serving his sentence, he is required as a witness against C. D. in the police court. His presence there will be secured by presenting to the governor of the prison a warrant by a magistrate of the police court countersigned by the sheriff.

The citation to a Scottish criminal court of witnesses resident in England is authorised by an Act of 1805—45 Geo. 3, c. 92—which enacts that “the service of any process upon a person in any one of the parts of the United Kingdom requiring the appearance of such person to give evidence in any criminal prosecution in any other of the parts of the same shall be as good and effectual in law as if the same had been served in that part of the United Kingdom where the person so served is required to appear.” Witnesses failing to attend may be punished, but only if the court is satisfied that “a reasonable and sufficient sum of money to defray the expenses of coming and attending to give evidence and of returning from giving such evidence” was tendered to the witness when the process was served upon him.

The form in use for citation of English witnesses to the Edinburgh courts is in the following terms—“I, A. B., constable in the County of . . . . ., by virtue of a warrant dated the 9th day of September, 1943, upon indictment (complaint) at the instance of H.M. Advocate (J. M., City Prosecutor) against C. D., do, in His Majesty’s name and authority, and in terms of an Act of Parliament of the 45th year of the reign of George the Third, chapter 92, lawfully summon, warn and charge you, E. F., to compear before the Sheriff of the Lothians and Peebles (Judge of Police) in the Sheriff Court House, Edinburgh (Burgh Court, Edinburgh), upon the . . . . . day of . . . . . 1943, in the hour of cause (ten o’clock forenoon), there to bear leal and soothfast witnessing, in so far as you know, or shall be asked at you, anent the said accused’s guilt of the crime mentioned in the said indictment (complaint) and that under the certification contained in the said Act of Parliament; and further I hereby tender to you the sum of . . . . . pounds sterling, being a reasonable and sufficient sum of money to defray the expenses of your going and attending to give evidence and of returning from giving such evidence. This I do upon the day of . . . . . 1943.

A. B., *Police Constable.*

This form is sent by the police to the chief constable of the English force concerned, together with a blank form of execution of citation. It should, after service has been made, be returned with the execution completed and a receipt for the money signed by the witness.

### The Court Inspector.

In the larger centres, one finds a special department of police administration, known as the Court Office, under the charge of an inspector. The court inspector and his staff are responsible for attending to the detail of many matters essential to the proper and effective administration of justice. They keep careful and complete records of local convictions and court orders, usually by means of a card-index filing system ; see to the service of complaints and the citation of witnesses ; keep the court roll books ; maintain order in court ; exclude from court children under 14 years of age, as directed by section 44 of the Children and Young Persons (Scotland) Act, 1937 (but messengers, clerks and others required to attend court for purposes connected with their employment must be admitted), superintend and carry out arrangements by which persons in custody or cited to court appear in the dock in orderly succession ; and generally act as the servants of the court and secure its smooth working.

### Exclusion of the Public.

The hearing of a criminal case must take place with open doors, the public being admitted.

To this rule, there are a number of exceptions. (1) The court may be cleared because of disorder. (Macdonald, 4th edition, page 469). (2) The court may be cleared at the hearing of indecent and unnatural offences (Act, 1693, c. 27). (3) Where, in any proceedings in relation to an offence against decency or morality, a person who, in the court's opinion, is a child or young person is called as a witness, the court may direct that all persons other than members or officers of the court, counsel or solicitors, persons directly concerned in the case and reporters shall be excluded during the taking of the evidence of that witness. (Children and Young Persons (Scotland) Act, 1937, section 45) (4). Children under 14 years may be excluded, as explained in the preceding paragraph. (5) At a juvenile court, no person may be present except members and officers of the court, parties to the case, their solicitors and counsel and witnesses and others directly concerned in the case, newspaper representatives and such other persons as the court may specially authorise. (Children and Young Persons (Scotland) Act, 1937, section 52) (6). During the present emergency, special powers are granted to courts of hearing cases in camera. (Emergency Powers (Defence) Act, 1939, section 6).

Police officers, in excluding persons who have no right to attend a hearing, in clearing the court when directed to do so, and in removing disorderly persons, should use force only if need be and then only such minimum force as will effect the purpose.

An English court has held that an assertion by a member of the public of a right to be present at a hearing is no answer to a charge of assaulting a constable who acted in such a way as to defeat his right. (*R. v. Eardly*, 49 J.P. 551).

### The Exclusion of Witnesses.

Among the most important of the duties of a court officer is to make sure that unexamined witnesses do not remain in court while other witnesses are being examined ; that witnesses who have given their evidence remain in court (unless they have been excused from further attendance, in which case they should at once leave the building) ; and that there is no communication between witnesses waiting to give evidence and those who have already been in the box or members of the public who have been in court and have heard the evidence.

On the calling, in a summary court, of a case in which evidence is to be led, the accused comes forward, the clerk of court reads the charge and, on the assumption that the plea of not guilty tendered at the previous calling is adhered to, the prosecutor calls his first witness. That witness comes forward from the body of the court or is ushered in from the witness room by a court officer and takes his stand in the witness box. It is then the court inspector's duty to intimate loudly and clearly that all other witnesses in the case must leave the court. (At an adjourned diet, the formula is varied to "All witnesses who have not been heard, leave the court !"). So far as possible, the court officers must see that this order is at once obeyed. They will already have a note of the witnesses for the prosecution and will probably know where they are ; but defence witnesses (of whom no notice is required in a summary court) are apt to be overlooked. It is a good plan, at this stage, to ask the accused whether he has any witnesses and, if so, whether any are sitting in court.

Failure to remove from the court all unexamined witnesses may gravely prejudice the "side" whose witnesses are allowed to remain. The common law rule was absolute—that "before proceeding to proof all the witnesses on either part are shut up in an apartment by themselves, whence they are successively called into court to be examined ; so that it is a good objection to any one that he has been left at large and has heard the testimony of another, or part of it even, by which he may shape his own" (Hume, volume 2, page 379). This rule was qualified by the Evidence Act, 1840, which gives to the court a discretion to allow the examination of a witness who has been sitting in court and has heard part of the evidence "where it shall appear to th

court that the presence of the witness was not the consequence of culpable negligence or criminal intent and that the witness had not been unduly instructed or influenced by what took place during his presence or that injustice will not be done by his examination"; but the Act applies only to procedure in the High Court of Justiciary and the sheriff court and *not* to proceedings in a police or J.P. court. (*Docherty*, 1912, 6 Adam 700). In the lesser courts, therefore, a witness who has been present in court must be rejected, unless the prosecutor or defence agent, as the case may be, waives his right to object. In practice, the rule is relaxed in favour of (1) medical men, who may remain in court to hear the general evidence but must leave when other medical evidence is tendered, (2) the defence agent, who may enter the witness-box although he has been present throughout the hearing, and (3) witnesses who are to speak to such incidental matters as accused's general character as distinct from the merits of the case.

In England, the rule is altogether different; for there unexamined witnesses may remain in court until the judge, at the request of either party, has made an order removing them. In the Central Criminal Court and in many other English courts, the Scottish practice is now followed.

#### **In the Witness Box.**

In most Scottish prosecutions, the evidence of the police is important; in many, it is crucial—so that, if the officers give their testimony with accuracy, without serious contradiction on matters material to the issue and in a manner which carries conviction to the mind of judge or jury, the prosecution succeeds; if not, it fails. A truthful witness may not be believed; the evidence of a plausible rogue may find acceptance. The appearance, demeanour and general bearing of a witness may commend his evidence or cause it to be discounted. The following hints, suggested by a long experience of the virtues and shortcomings of police evidence, may prove of service.

1. A police witness must present a smart appearance. If he normally wears uniform when on duty, he should do so in the box, unless there is some good reason to the contrary. If a detective or plain clothes officer, he should be fittingly dressed. A turned-up coat or jacket collar or other minor slovenliness in dress makes a bad impression.

2. While in the box, his attitude should be at all times alert, without stiffness. He need not stand stiffly to attention, but should avoid a slouching posture and should at no time lean over the front of the witness stand.

3. On first entering the box, he should come smartly to attention, face the judge and raise his right hand in preparation for the administration of the oath. In Scotland, the oath is taken without the use of the Bible. It is administered in a series of phrases, each spoken by the judge and repeated by the witness—thus :—*Judge*—“I swear.” *Witness*—“I swear.” *Judge*—“by Almighty God” (*Witness repeats*). *Judge*—“That I shall speak the truth” (*Witness repeats*). *Judge*—“the whole truth” (*Witness repeats*). *Judge*—“and nothing but the truth” (*Witness repeats*).

4. A police witness should speak out, directing his answer towards the judge but enunciating each word slowly and distinctly, so that it can be heard without strain by judge, jury, prosecutor, clerk, accused, counsel or agent and members of the public present in court. It should be possible to hear every word at the back of the court room. If the magistrate or the accused is dull of hearing, the court officer should warn the witness beforehand.

5. At all stages—whether the examiner be the prosecutor, the judge, accused or his agent—the witness should be respectful and keep his temper. He loses nothing by adding “sir” to his answer. A magistrate or justice is properly addressed as “Your Honour”; a sheriff or High Court judge as “My Lord.”

6. Evidence in a Scottish court is invariably led by question and answer—thus :—*Prosecutor*—“I think your name is A. B. and you are a detective inspector in the City Police ?” *Witness*—“Yes, sir.” *P.*—“On the evening of 15th September, about 7 p.m., were you on duty in Blank Street ?” *W.*—“Yes, sir.” *P.*—“Did you have a complaint made to you ?” *W.*—“Yes, sir.” *P.*—“By whom ?” *W.*—“By John Smith, 10 Blank Street.” And so on. On occasion, in a trivial case, the witness, after a few introductory questions, is invited to tell his own story and allowed to proceed for some time without interruption; but this method is not to be commended when crucial matters, about which parties are at issue, are reached. A witness should listen carefully, make no attempt to answer until the question has been completed, and should then answer the question asked—that and no more. The answer should be brief, accurate and comprehensive. “Yes, sir,” or “No, sir,” are often the ideal replies; but if a bald affirmative or negative would be misleading, the witness should not hesitate to qualify his answer. A witness should make no attempt to learn his evidence by heart. He should have in his mind a general outline of the incident on which he is to be questioned. Before coming into court to give evidence he may refresh his memory from notes taken by him at the time.

7. The language used by a witness should be as direct and simple as may be. A simple, short word often carries more conviction than a long one. Police jargon should be avoided. "I was going along Blank Street when I saw" is better than "I was proceeding along Blank Street when I observed." Such phrases as "shouting, bawling, cursing and swearing" invite awkward cross-examination. Do not be afraid of the word "drunk." How often does one encounter the policeman who, having arrested a man as "drunk and disorderly," and being asked "What was his condition?" will say almost anything except the one thing needful —"he was drunk"!

8. A police witness should remember that he is giving his own evidence only. His colleague will follow and will speak for himself. To say "We then saw the accused" is patently absurd. Such a phrase as "The accused was seen" is meaningless. It is a sound rule to keep to the first person singular.

9. All relevant and proper questions must be answered, however inconvenient the result. A police witness asked to specify his place of observation must give it. (*Thomson*, 1900, 3 Adam 195). But, in the first place, he may offer to write down his answer and, if accused or his agent is willing to accept this, good and well. In case of doubt, an appeal may always be made to the bench—"Must I answer that, Your Honour?"; but the judge's ruling must be accepted without comment by the witness. The prosecutor is there to protect police witnesses against unfair questions put in "cross," and the judge has a duty to see that no witness is unfairly pressed.

10. A police witness is perfectly within his rights in consulting his notebook when his memory fails him on some detail; but the book (or, at least, the entry referred to) at once becomes common property, open to inspection by all parties. See the comments made in an earlier chapter at page .

11. Many officers of experience seem to find difficulty in appreciating the importance of using the exact words when speaking to what an accused said when formally charged. To say "he admitted the charge" conveys nothing and invites a devastating cross-examination. What the witness should say is, of course, "He said 'I admit it'"—or as the case may be. The precise words should be given, however crude they may have been. It is a mistake to translate an answer in the Doric into "good English" or to correct faulty grammar. (The writer recently had in his hand a police report in which it was alleged that the accused, a very young boy from a poor home, said, in answer to a charge, "I

received it from a boy in the vicinity of Arthur Street.") Occasions occur when a witness cannot tax his memory with the precise words of a lengthy statement made in circumstances which did not admit of its being taken down verbatim. In such a case, the purport of what was said may be given, so long as the witness makes it clear that he is paraphrasing.

12. In cross-examination, the witness must never become aggressive, raise his voice or argue. However exasperating the questions may be, he must keep his temper and be respectful. In "cross," leading questions are legitimate and deliberate traps may be set for the witness. He should be wary, listening carefully to the questions and pondering the effect of his answers. A favourite device is to face the second police witness with some statement already made by a colleague and ask him to reconcile it with his own evidence. If the witness is sure of his story, he should stick to it, whatever his colleague may have said. If he has made a mistake, he should accept this opportunity to correct it.

## CHAPTER XII

## THE RIGHT OF ENTRY INTO PRIVATE PREMISES

A CONSTABLE'S appointment card is not an "Open Sesame." It does not give him a right to go where he likes, to invade at his whim the privacy of occupiers of lands or buildings. Apart from special circumstances justifying his trespass, he can claim no rights other than those possessed by members of the public. If, without such justification as is explained in this chapter, he chooses to enter upon lands or into houses or private buildings, he runs the same risk as any ordinary citizen of being ejected or dealt with as a trespasser.

While this is so, circumstances may conspire to confer upon a constable a special right of trespass—and even, in particular circumstances, a right to break in—denied to the private citizen. This right may emerge either at common law or under statute.

### 1. Rights of Trespass at Common Law.

A constable who has seen a serious crime committed, or to whom immediate complaint has been made by some person who is credible and sure of his facts, may, without any warrant, pursue the offender into a private house and there arrest him. "As to the power of breaking open doors in pursuit of a criminal on such occasions, it is undoubted," says Alison (volume 2, page 118), "that in cases of murder, robbery, housebreaking, rape, fire-raising, treason or the like, which by their violence threaten the peace of society, he may break open doors where the fugitive has taken refuge, or he has received reasonable information he has taken refuge, without any warrant at all." Before proceeding to break in, a constable should knock loudly, announce his identity, demand admittance, and use force if this is refused (or, presumably, if no one answers). In cases of mere breach of the peace, he may break in only to quell a disturbance actually proceeding and audible from outside.

A constable in possession of a warrant of arrest has right of entry to premises in which he reasonably believes the offender to be. Before entering, he should knock loudly, announce his identity to anyone who comes in response to his knocking, and notify his errand. If refused admittance (and, one assumes, if no one comes in answer) he may open the door and walk in and, if need be, break down the door. The right to break in applies to any house or place within the house. (Macdonald, 4th edition, page 293).

"Most certainly," says Alison (volume 2, page 124), "he is not obliged to take the word of those within the house that the criminal is not there; but is not only entitled, but bound, to make a thorough search himself; and for that purpose not only to force the outer door but any inner doors or lids of places where the prisoner is suspected of being lurking. . . . The principle of law is that every person is bound to throw open his doors and make patent all the secret parts of his dwelling or premises in order to facilitate so important an object as the arrest of a criminal"; and he adds that, if the formalities have been respected, the officer will not be responsible for the consequences although the suspect neither truly is nor ever has been within the premises "or though, if there, he is entirely innocent of the charge or the felony or crime in question has never been committed."

In exercising their right to detect and investigate violations of the law (see chapter 5), the police have certain rights of entry upon land and into premises without the consent of owner or occupier. Two Scottish decisions are directly in point. In *Shepherd v. Menzies*, 1900, 37 S.L.R. 335, a farmer sought to interdict the chairman, directors and secretary and one of the inspectors of the S.S.P.C.A. from trespassing on his lands. From the averments it appeared that, because of complaints of cruelty to horses on the farm, one of the society's inspectors had gone to the farm along with a constable, entered fields where horses were working and examined a number of horses and that a prosecution followed, in which a ploughman employed by the farmer was convicted of a contravention of the Cruelty to Animals (Scotland) Act, 1850—now repealed—in respect of one of the horses. Interdict was refused. Although something turned upon the express right of arrest without warrant conferred by the Act of 1850, it is clear that the judges approved of the constable's actings, and one of the judges went out of his way to assert a common law right in the police to enter upon private property in such a case. "I rather imagine," said Lord Kyllachy, "that at common law a police officer who has information that an offence is being committed may, if necessary, with or without a warrant, enter upon private property for the purpose of ascertaining the fact—or stopping the commission of the offence and if necessary of apprehending the wrongdoer." The reference to "apprehending the wrongdoer" would, of course, apply only to circumstances in which a right of arrest without warrant arose either at common law or under statute. (See chapter 8). Two years later (in *Southern Bowling Club Ltd. v. Ross*, 1902, 4 F. 405) a similar issue was sharply raised with reference to private premises. A private club sought a declarator against the Chief Constable of Edinburgh and a sergeant to the effect that it was illegal for members of the police force,

acting on the chief constable's instructions, to enter the club premises in disguise with the purpose of discovering whether shebeening was practised in the club. The declarator was refused. For our present purpose, the importance of this decision lies in a dictum of Lord Kincairney—"Whatever be the general rule of law as to the right of the police to enter a private house without a warrant, it seems quite impossible to deny that there may be exigencies under which the police may have right to enter a private dwelling." It is well to note that all that Lord Kincairney asserts is a possible right to enter, not a right to insist upon entering in face of a challenge by the occupier. Indeed, the Inner House judgments make it clear—(1) that a detective seeking to insinuate himself into private premises may be refused admission "and it will be no answer for him to say that he is a detective," and (2) that a detective who had contrived to enter might be called upon to leave. Certainly the decision is no authority for the proposition that, in order to detect a violation of the law suspected to be occurring on private premises, constables have any right to use force in effecting an entrance.

The general right of the police to enter private premises has been discussed in two recent English cases. In the more recent of these, two constables saw a lorry on a street outside a garage in circumstances which appeared to amount to a contravention of a local police Act. They went on along the street, decided to look into the matter and turned back—by which time the lorry had been driven into the garage. They entered the garage to locate the person responsible and did so without invitation and without receiving permission. Just then, the proprietor came in from the street and challenged the officers—"What's this? What do you want here?" The officers declared their identity and explained—to which the proprietor's retort was "Get outside; you can't come here without a search warrant." One of the officers started to produce his warrant card—a gesture which the court construed as a claim to remain on the premises—whereupon the proprietor assaulted him. On appeal, it was held that the proprietor could not be convicted, on these facts, of assaulting a constable while in the execution of his duty. Even if the police had a right to enter to make enquiries, they became trespassers when told to leave and, in claiming to remain, were no longer in the execution of their duty. Note particularly that there was no question of any offence being committed on the premises. (*Davis v. Lisle*, 1936, 2 K.B. 434).

In the earlier case (*Great Central Railway Co. v. Bates*, 1921, 3 K.B. 578), a constable, noticing a warehouse door open after dark and in order to see that everything was in order, entered the warehouse, fell into an unfenced sawpit inside and was injured.

It was held, on appeal, that he had no right to enter and that, even if a right to enter could be assumed, the occupier of the premises was under no duty to make the place safe for him or warn him of the danger. He was neither an invitee nor a licensee and he must take the premises as he found them.

As already explained in chapter 4, at page 39, police officers have a right to insist upon entering, and to remain in, private premises in which is being held a public meeting if they have reasonable ground for believing that, if they were not present, seditious speeches would be made and incitements to violence and breach of the peace would occur. (*Thomas v. Sawkins*, 1935, 2 K.B. 249).

### Search of Premises.

Where the police or the criminal authorities consider it advisable to institute a search within private premises either for stolen property or for articles which may serve to support a charge already made against the person at whose repositories the warrant is directed (see *Bell v. Black and Morrison*, 5 Irvine 57), the only safe course is first to apply to a magistrate, justice or sheriff of the jurisdiction concerned for a search warrant. To this rule there is now an acknowledged exception where (1) an arrest has been made on a serious charge, such as murder, (2) there is such urgency that the purpose of the search might be defeated if time were taken to seek out a magistrate and procure a search warrant, and (3) there is good reason to believe that the search, if immediately made, will result in the recovery of articles which will be of service in pinning the crime to the person arrested. In the Perth murder trial in 1935 (*H.M. Advocate v. M'Guigan*, 1936, J.C. 16), objection was taken to the admission in evidence of articles so seized. Lord Aitchison repelled the objection on the ground that "it must be obvious that, the accused having been arrested on so grave a charge as murder, it might be of the first importance to the ends of public justice that a search of the tent in which the accused had been living should be made forthwith. The police acted at their own hand, just as they acted at their own hand in apprehending and searching the person of the accused. In the circumstances, the matter being in the view of Inspector D. one of urgency, the police were entitled to act without delay and without having obtained a warrant from a magistrate." In the writer's view, this decision cannot be relied upon to justify search of premises without a warrant either where the charge is relatively trivial or where, although the charge is serious, there is no real urgency. Having arrested a shoplifter, the police are not entitled, without first procuring a warrant, to go to the house of the arrested person

and ransack it on the off chance of finding other goods stolen from the same or other shop premises on previous occasions.

It is, of course, competent and proper to search premises or receptacles, when necessary in the interests of justice, with the full and free consent of the person or persons concerned; but (1) such consent should be obtained in the presence of at least one reliable and independent witness (preferably not a police officer)—otherwise, it may later be repudiated; (2) it is extremely doubtful if the consent of the wife of the occupier of premises (or of a husband, if a married woman be the occupier) would be held equivalent to the occupier's consent—especially if the occupier were then in custody; (3) consent must not be extorted by anything in the shape of threats or improper inducements; (4) even where a full and free consent is given, the investigating officers should insist upon the person giving the consent accompanying them in their search, so as to avoid any suggestions against them later; and (5) consent of the occupier of premises would not justify the officers in interfering with receptacles belonging to some other person—as by breaking into a servant's box or lodger's suitcase.

Whether a search be made with or without a warrant, the officers should be careful not to disturb unnecessarily residents or others in the premises, to replace articles moved, so far as may be, in their original position, and to reveal nothing seen except to their superior officers, the prosecutor or the sheriff, justice or magistrate issuing the warrant.

### **Search Warrants.**

A search warrant may be granted either as an incident of proceedings already set on foot or on an independent application. The petition by which "solemn" procedure is initiated normally embraces a crave "to search the person, repositories and domicile of said accused and the house or premises in which he may be found, and secure for the purposes of precognition and evidence all writs, evidents and articles found tending to establish guilt or participation in the crime foresaid and, if necessary for any of the purposes foresaid, whether of apprehension or search, to open all shut and lockfast places" (Renton & Brown's Criminal Procedure, 2nd edition, page 303). In summary procedure, a similar warrant may be granted by the magistrate, justice or sheriff before whom a complaint is laid. (Summary Jurisdiction (Scotland) Act, 1908, section 20).

The most common type of search warrant—that aimed at the recovery of stolen property—is normally procured by an application made to a magistrate, justice or sheriff independently of proceedings. If time allows, this application is made by the local

prosecutor, to whom the police have submitted a verbal or written summary of the facts; but, where there is urgency, the investigating officers may themselves make a direct approach to the nearest magistrate. In the latter event, the magistrate should, before signing the warrant, put the applicant on oath and learn from him of the reason for his suspicions. In either event, the application should be signed by the prosecutor or police officer making it.

In Edinburgh, two forms are in common use—the first when the application is made by the prosecutor, the other when it is made by the police.

#### FORM A.

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UNDER THE SUMMARY JURISDICTION (SCOTLAND) ACT, 1908.  
IN THE BURGH COURT OF EDINBURGH.

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#### THE PETITION OF J. M., CITY PROSECUTOR.

HUMBLY SHEWETH

That there is reason to believe that certain property consisting of and other articles the precise nature of which is to the Petitioner unknown, which property is stolen, is to be found in the

The Petitioner therefore craves the court to grant warrant to officers of law to search the premises aforesaid for the stolen property above mentioned and to take possession thereof and to convey it to the Police Chambers, High Street, Edinburgh.

According to Justice,

*City Prosecutor.*

*Edinburgh*, , 1943.—The Court, having considered the foregoing Petition, grants warrant as craved.

*Judge of Police.*

(*Note*.—A warrant to search, where necessary for its execution, implies warrant to break open all shut and lockfast places. (1908 Act, section 23)).

## FORM B.

At Edinburgh, the day of , 1943, in presence of Judge of Police, Compeared constable in the Edinburgh City Police, who, being solemnly sworn and examined, deposes that there is reason to believe that certain property consisting of and other articles, the precise nature of which is to the deponent unknown, which property is stolen, is to be found in the

and that it is necessary that he should obtain warrant to search the place aforesaid for the stolen property above mentioned and to take possession thereof and to convey it to the Police Chambers, High Street, Edinburgh.

.....*Deponent.*

.....*Judge of Police.*

*Edinburgh*, the day of , 1943.—I, Judge of Police, hereby grant warrant as craved.

*Judge of Police.*

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An application for a warrant to search should be as specific as circumstances allow. The nature of the property should be detailed with the utmost care and the premises to be searched described in such a way as to distinguish them from all others. A general warrant, purporting to give authority to search anywhere, is illegal. (See Macdonald's Criminal Law, 4th edition, page 322, and the authorities there cited, and note that Alison (volume 2, page 147) is out of date).

In executing a search warrant, the police should observe the formalities appropriate to the execution of a warrant to arrest. Before force is used to enter the premises, the officers should knock loudly, announce their identity and demand admittance. If possible, the warrant should be executed in the daytime, but there would appear to be nothing irregular or illegal in making the search at night and, in practice, a visit at night may often yield better results. (Alison, volume 2, page 147).

In carrying out the search, the police should not go beyond the scope of their warrant. If, for instance, the only articles

specified in the warrant are of a bulky nature, there can be no justification for opening receptacles too small to contain these articles or for prying into the contents of private documents. If, however, in course of a proper search, the officers come across documents or articles showing complicity in the crime under investigation, the seizure of these will be excused. (*Pringle v. Bremner and Stirling*, 1867, 5 Macpherson H.L. 55, and the English case of *Elias v. Pasmore*, 1934, 2 K.B. 164, which goes much farther than any Scottish authority).

In judging of the actings of the police when executing a search warrant, the court will look to the essential requirements of justice and to the good faith of the officers concerned and will not apply too strict and literal a standard. This appears from the judgments of the High Court in *Morris and Jones v. Langmuir*, 1929, J.C. 103. The Glasgow police had procured a warrant under the provisions of a local police Act relating to betting houses. The warrant covered only No. 4 of a series of stables. On the occasion of the police raid, satisfactory observation was kept on No. 4 stable; but, as the police closed in, a warning was given to the persons under observation, who rushed out of No. 4 into No. 3 stable. The police followed them up, took them back into No. 4 stable and there dealt with them in terms of the warrant. This course was approved by the High Court judges, who described as extravagant the suggestion that, because of a temporary escape from just inside the place covered by the warrant to just outside it, the police should stand by and do nothing.

## 2. Rights of Trespass under Statute.

The common law powers of the police to enter upon lands and into premises, to break in and to search are supplemented by express powers under particular Acts of Parliament. These powers are granted for particular and limited purposes—e.g., to enable the police to surprise the occupants of a brothel or gaming house. They vary in their terms and, in taking advantage of them, the precise wording of the powers must be heeded. The following points are particularly to be kept in mind—

(1) Many of these statutory powers are made to depend upon an oath of verity—see, as illustrative, the power of entry and search set out below under “Aliens”—“a justice of the peace, if satisfied by information on oath that . . . .” In such a case, a credible witness, such as the police officer in charge of the enquiry, must attend before a justice, who will put him on oath and hear his story. The witness will then sign, and the justice will countersign, a written deposition, which may be on the lines of Form B on page . . . The deposition should echo the words of the section

of the Act under which it is proposed to proceed. In certain cases, the person or persons on whose oath a warrant may be issued are restricted to police officers of specified rank—e.g., see under “Brothels.”

(2) Even where a right to enter premises is conferred, the right to use force in effecting an entry may be withheld. Such a right should never be assumed. It depends upon the presence of such words as “by force, if need be.” Resort to force should, even where expressly authorised, be made only if entry without force is not possible or would defeat the purpose of the raid. The force used, and the damage done, should be the least which will serve the purpose.

(3) Careful note should be taken of the person or persons in whose favour a warrant may be granted. For instance, section 47 of the Children and Young Persons (Scotland) Act, 1937, authorises issue of a warrant to “any constable named therein.” In such a case, the justice must, at the time of the application, be supplied with the name of the constable or constables by whom the warrant will be executed.

(4) The section under which a warrant is issued may place some limit on the time at which it is to be executed—“at all reasonable times,” “at any reasonable time within 48 hours of the making of the order,” “within the hours of business,” and so on. Instances will be found in the list of statutory powers given below.

Note that a warrant under the Sea Fisheries Act, 1895, must specify the time or times of entry.

(5) Generally, any directions given in the statute as to the manner of executing the warrant, or power of entry without warrant, must be strictly adhered to—e.g., in certain cases it is directed that a woman must be searched only by a woman; in others, that the constable executing the warrant must be accompanied by a doctor. For instances, see below.

A list of statutory powers of entry, search and seizure—set out for convenient reference, under headings alphabetically arranged—is appended. The list may not be exhaustive, but an effort has been made to include all powers likely to be of advantage to the Scottish police in carrying out their ordinary duties.

#### **Air Navigation.**

A police constable has right of access at all reasonable times to any place to which access is necessary for the purpose of carrying out his powers and duties under the Air Navigation (Consolidation) Order, 1923, as amended. (Article 8 (1)).

### **Aliens.**

A justice, if satisfied by information on oath that there is reasonable ground for suspecting that an alien, by having some article in his possession or under his control, has contravened the Aliens Order, 1920, and that the article is to be found in specified premises, may grant warrant authorising a police officer of rank not lower than that of inspector or a commissioned officer of H.M. forces, together with any named persons and other constables or members of the forces to enter the premises at any time within one month from the date of the warrant, if necessary by force, to search the premises and persons found therein (no woman being searched except by a woman) and to seize any article in respect of which the officer reasonably believes a contravention has occurred or which he reasonably believes to be evidence of such contravention. In cases of urgency, a police officer of a rank not lower than that of superintendent may, by a written order under his hand, confer like powers. Articles seized may be retained for one month or, if proceedings are commenced within that period, until they are concluded. (Aliens (No. 3) Order, 1940, S.R. & O. 1940, No. 890).

When a club or restaurant has been closed by order in terms of article 10 of the Aliens Order, 1920, any constable authorised by his chief may, for the purpose of enforcing the provisions of article 10, enter, if necessary by force and search or occupy the premises.

### **Animals (Cruelty to).**

A magistrate may, by order in writing, authorise the chief constable of a burgh (to which the Burgh Police (Scotland) Act, 1892, section 405, applies), with such constables as he may think necessary to enter a "house, room, pit or other place kept or used for the purpose of fighting, baiting or worrying any animals," and take into custody all persons found therein without lawful excuse. (Angus, in his "Police Powers and Duties," at page 6, maintains a common law right to apply for a warrant in cases of animal baiting; but he cites no authority).

Any constable has a right to enter any knacker's yard at any hour by day or at any hour when business is or apparently is in progress or usually carried on therein. (Protection of Animals (Scotland) Act, 1912, section 5).

### **Animals (Performing).**

Any constable may enter at all reasonable times and inspect any premises in which any performing animals are being trained or exhibited or kept for training or exhibition and any such animals found therein and may require any person whom he has reason to believe to be a trainer or exhibitor of performing animals to

produce his certificate. But a constable is not entitled to go on or behind the stage during a public performance of performing animals. (Performing Animals (Regulation) Act, 1925, section 3).

#### **Animals (Vivisection).**

Provision for the issue of a search warrant directed to "any officer or constable of police" will be found in section 13 of the Cruelty to Animals Act, 1876.

#### **Animals (Slaughter of).**

Any constable and any person authorised in writing by a local authority may enter any slaughter house or knacker's yard in the district of the local authority at any time when business is or appears to be in progress or is usually carried on therein for the purpose of ascertaining whether there is or has been any contravention or non-compliance with the provisions of the Slaughter of Animals (Scotland) Act, 1928 (section 4).

#### **Army.**

Section 156 (5) of the Army Act enables a court of summary jurisdiction, if satisfied on oath of reasonable cause to suspect that a person has in his possession, or on his premises, any property with respect to which an offence under the section has been committed, to grant a search warrant. The officer executing the warrant shall seize the property and "shall bring the person in whose possession the same is found before some court of summary jurisdiction, to be dealt with according to law." To appreciate the scope of this power, section 156 must be read carefully. Broadly, the property aimed at is "army issue" which has been bought, pawned, detained or received "on any pretence whatsoever."

Section 114 of the Army Act, as amended by section 7 of the Army (Annual) Act, 1919, empowers a justice of the peace, where an officer acting under authority of the Army Council has been obstructed in exercising his powers of entry to inspect carriages or animals (for impressment purposes), to issue a warrant authorising a named constable, accompanied by the officer, to enter the premises in respect of which the obstruction took place at any time between 6 a.m. and 9 p.m. and to inspect any carriages or animals found therein.

#### **Betting Houses.**

So that the police may enforce the betting laws, in so far as they relate to premises, special statutory powers of entry and seizure have been conceded to them.

(1) Section 11 of the Betting Act, 1853 (extended to Scotland by the Betting Act, 1874), empowers a justice, "upon complaint made before him on oath that there is reason to suspect any house, office, room or place to be kept or used as a betting house or office contrary to this Act, to give authority by special warrant . . . . to any constable or police officer to enter, with such assistance as may be found necessary, into such house, etc., and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise and to arrest, search and bring before a justice of the peace all such persons found therein and to seize all lists, cards or other documents relating to racing or betting found in such house or premises."

#### COMMENTS.

"Contrary to this Act." Premises are kept or used in contravention of the Act if they are kept or used for the purpose of ready-money (as distinct from credit) betting or for the purpose of betting with persons resorting thereto.

"Upon complaint made before him on oath." An oath of verity is an essential preliminary. Such oath should make it clear that the premises are being kept for one or other, or both, of the purposes referred to. The evidence given usually shows that a ready-money test bet was sent and accepted or that observation of the premises has revealed a considerable traffic of persons to the premises at racing hours—particularly visits by street touts.

The power of arrest has been held, in England, to apply only to persons found on the premises for the purpose of betting. (*Davis v. Sly*, 1910, 26 T.L.R. 460). In Scotland, the power of arrest is never exercised.

"All lists, cards or other documents." The police are empowered to open postal or other communications found on the premises, although contained in closed envelopes, to ascertain if they contain documents relating to betting. (*Strathern v. Benson*, 1925, J.C. 40). Postal orders may be seized. (*Hodgsons v. Macpherson*, 1913, 7 Adam 118).

A warrant under the Act of 1853 is appropriate in the case of a raid on a commission agent's premises.

(2) Independently of the Act of 1853, any constable "having good grounds for believing that any house, room or place is kept or used as a gaming or betting house" may enter "and, if needful, use force for the purpose of effecting such entry" and may take into custody all persons found therein and seize all tables for, and instruments of, gaming and all moneys and securities for

money. (Burgh Police (Scotland) Act, 1892, section 407). Section 129 of the Edinburgh Corporation Act, 1933, is in identical terms. In Glasgow, provision is made for the issue of a magistrate's warrant—Glasgow Police (Further Powers) Act, 1892, section 15—but application for a warrant is not a condition precedent to conviction. (*Bunton v. Miller*, 1926, J.C. 120). The power of seizure under the Glasgow Act, where a warrant has been obtained, is wider than that under the general or the Edinburgh Acts, as it extends not only to tables for, and instruments of, gaming and to moneys and securities for money found in the house, but also to "books, lists, cards or other documents or things relating to gaming, racing or betting." Under all these provisions, money may be seized by the police (and subsequently forfeited by the court) although it had no relation to betting or gaming. (*Campbells v. Borthwick*, 1903, 11 S.L.T. 74). If the prosecution fails, the articles and money seized should be returned to the accused from whom it was taken. (*Gordon*, 1910, 2 K.B. 1080).

### **Brokers.**

While no express power is given to the police to enter brokers' premises, such power would appear to be implied in the Burgh Police (Scotland) Act, 1892, which places upon brokers an obligation at all reasonable times to exhibit and produce to the chief constable, or to any constable acting under him, "all articles in his possession or which he may have received or purchased and also to produce his books in which the description of any such articles is or should have been entered when required in the police court, or to the chief constable, or any constable acting under him, and having the general or special authority of a magistrate, in which book the constable requiring and obtaining production thereof shall on every occasion subscribe his name immediately following the last entry therein." A broker is also under obligation to deposit with the chief constable goods which have been stolen, embezzled or fraudulently obtained. (Section 436).

### **Brothels.**

(1) By virtue of his office, any constable has power to enter at any time "any house or building or brothel for the reception of prostitutes." (Burgh Police (Scotland) Act, 1892, section 401; Edinburgh Corporation Order, 1933, section 104; Glasgow Police Act, 1866, section 88).

(2) A magistrate, on application by the burgh prosecutor, may grant warrant to enter into and search from time to time, during any period not exceeding 30 days from the date of the warrant,

any house or building, or part thereof, which on examination of the chief constable or an inspector or lieutenant of police and at least one other person not holding office or situation under the Burgh Police Acts, the magistrate is satisfied there is reasonable ground for believing to be kept, managed or used or suffered to be used as a brothel. Power of arrest is given and it extends to the occupier and any person found therein who either temporarily or permanently manages or assists in the management of the brothel. (Burgh Police (Scotland) Act, 1892, section 403—which has been adopted by, and applies to, Glasgow).

*Note.*—A brothel is a place where people of opposite sexes are allowed to resort for illicit intercourse, whether the women are common prostitutes or not (*Winter v. Wolfe*, 1930, W.N. 266; 95 J.P. 20) and whether or not money passes (*Girgaway v. Strathern*, 1925, J.C. 31, at page 35). But a house occupied by one woman who therein accommodates various men but allows no other women to accommodate men is not a brothel. (*Singleton v. Ellison*, 1895, 1 Q.B. 607; *Caldwell v. Leech*, 77 J.P. 254). As to a block of flats inhabited by different women who bring men there, see *Durose v. Wilson*, 71 J.P. 263.

(3) A power of search addressed to “some superintendent, inspector or other officer of police” may be given by a justice on information on oath by a parent, relative or guardian of a woman or girl or any other person acting in her interests, that there is reasonable cause to suspect that she is unlawfully detained for immoral purposes. Force may be used, if need be. The police officer executing the warrant is accompanied by the person making the complaint, if he so desires, unless the justice otherwise directs. For the meaning of “unlawfully detained” the section should be consulted. (Criminal Law Amendment Act, 1885, section 10).

#### Burgh Police (Scotland) Act, 1892.

Certain of the powers of entry conferred upon the police by this Act have been detailed under separate headings—see “Animals (Cruelty to)”; “Betting Houses”; “Brothels”; “Weights and Measures.”

Section 401. “Any constable shall have power, by virtue of his office, at any time to enter any premises or other place of the following description and every part thereof—

(1) any place to which the public are admitted, by payment or otherwise, used for the purpose of a theatre, public show, or other place of public amusement or entertainment;

(2) any music, singing or dancing saloon, or any shooting gallery, or bowling or nine-pin alley, or any place for playing skittles, or any eating-house, coffee-house or other such place;

(3) any victualling-house, public-house, house or building in which wine, spirits, beer, cider or other exciseable or fermented or distilled liquors are sold or suspected to be sold, whether licensed or not;

(4) any house or building or brothel for the reception of prostitutes or usually frequented by thieves or loose and disorderly persons;

(5) any building or part of a building which is kept or used for a purpose in respect of which a licence is required by the provisions of this Act;

(6) any ship or other vessel not being employed in H.M. service."

Section 402. "Any magistrate may, by order in writing, authorise any constable to enter any building or part of a building suspected to be kept or used for stage plays or dramatic entertainments, or as a circus, or as a public show, into which admission is obtainable by payment of money or for money consideration and which is not licensed in accordance with the requirements of this Act, at any time when the same is open for the reception of persons resorting thereto, and to remove any person found therein without lawful excuse."

Section 467. ". . . and any constable may search any premises and may also stop, search and detain any vessel, boat, cart or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained or fraudulently carried away may be found and also any person who may be reasonably suspected of having or carrying in any manner anything stolen or fraudulently obtained or carried away; and any constable may seize anything stolen or unlawfully obtained or fraudulently carried away." It may be doubted whether this section is to be read literally and whether it operates to give the police any powers more extensive than those possessed by them at common law. It certainly should not be taken as authorising the police at any time to search premises without a search warrant.

#### **Chaff-cutting Machinery.**

Any constable acting upon the instruction of an officer of police not below the grade of inspector may at any time enter on any premises on which he has reasonable cause to believe that a chaff-cutting machine which does not comply with the statutory requirements is being worked, for the purpose of inspecting such machine. (Chaff-Cutting Machines (Accidents) Act, 1897, section 6). The statutory requirements, which are set out in the Act of 1897, apply only to machines worked by any motive power other than manual labour.

### **Children and Young Persons.**

(1) If, on application to a justice (magistrate or sheriff) by any person who, in the opinion of the justice, is acting in the interests of a child or young person (i.e., of any person under the age of 17 years), it appears to the justice on information on oath that there is reasonable cause to suspect that the child or young person is being assaulted, ill-treated or neglected in a manner likely to cause him unnecessary suffering or injury to health or that an offence mentioned in the first schedule of the Children and Young Persons (Scotland) Act, 1937, has been or is being committed in respect of the child or young person (see page 177), the justice may issue a warrant authorising any named constable to search for the child or young person, and if it is found that he is being so treated or that an offence as aforesaid has been or is being committed in respect of him, to take him to and detain him in a place of safety. The warrant justifies entry into premises, if need be, by force. The constable executing the warrant must be accompanied by the person making the application if that person so desires (unless the justice otherwise directs), and may also, if the justice so directs, be accompanied by a doctor. (Act of 1937, section 47). A "place of safety" is a remand home, poor-house, or police station or any hospital, surgery or other suitable place, the occupier of which is willing temporarily to receive a child or young person. (Section 110).

(2) A constable may enforce an order made under section 5 of the Children and Young Persons (Scotland) Act, 1937—which refers to children received for reward who are in a detrimental environment. The section should be consulted for its terms.

(3) A constable may take to a place of safety any person under the age of 17 years who, there is reason to believe, is about to go abroad in contravention of the Children and Young Persons Act, 1933, section 25. (See section 26).

*Note.*—No express power of entry is given in the two cases just cited, but power of entry, without force, seems to be implied when essential.

(4) If it is made to appear to a justice (sheriff or magistrate—section 110) by the education authority or by any constable that there is reasonable cause to believe that the provisions of part 3 of the Children and Young Persons (Scotland) Act, 1937 (which relate to employment and to juveniles taking part in entertainments) or of a bye-law made thereunder are being contravened with respect to any person, the justice may by order under his hand addressed to an officer of the education authority or to a constable empower him to enter, at any reasonable time within 48 hours of the making of the order, any place in or in connection with

which the person in question is, or is believed to be, employed or, as the case may be, taking part in an entertainment or performance, or being trained, and to make enquiries therein with respect to such person. Further, such officer or constable may, at any time during the currency of a licence issued under part 3, enter any place where the person to whom the licence relates is authorised by the licence to take part in an entertainment or to be trained and may make enquiries therein with respect to such person. (Children and Young Persons (Scotland) Act, 1937, section 36).

(5) A constable may enter any building in which he has reason to believe that an entertainment for children (i.e., under 14 years), or one at which the majority of persons attending are children, and at which the number of children exceeds one hundred is being, or is about to be provided, with a view to seeing whether the provisions of section 23 of the Children and Young Persons (Scotland) Act, 1937, are carried into effect. The section does not apply to any entertainment given in a private dwelling-house.

#### Cinematograph Exhibitions.

"A constable or other officer appointed for the purpose by a county council may at all reasonable times enter any premises, whether licensed or not, in which he has reason to believe that such an exhibition as aforesaid is being or is about to be given, with a view to seeing whether the provisions of this Act, or any regulations made thereunder and the conditions of any licence granted under this Act have been complied with." (Cinematograph Act, 1909, section 4). The exhibition referred to is an exhibition of pictures or other optical effects by means of a cinematograph or other similar apparatus for the purposes of which inflammable films are used. (Section 1). The phrase "appointed for the purpose" does not qualify the word "constable." A constable requires no special appointment. (*M'Vittie v. Turner*, 80 J.P. 25).

#### Coinage Offences Act, 1936.

The powers of arrest, seizure and search provided by this Act (section 11) make no express mention of the police; but normally the search warrant would be executed by constables. The warrant is issued by a justice to whom it is made to appear by information on oath that there is reasonable cause to suspect that any person has been concerned in counterfeiting any current coin and has in his possession any counterfeit coin or counterfeiting instrument or any other machine used or intended to be used for making or counterfeiting any current coin or any counterfeiting material. Any place belonging to or under the control of such person may

be searched, by day or by night. Counterfeit coins and counterfeiting instruments or material may be seized. If not required as evidence (or, if so required, on the completion of the case) these articles must be delivered forthwith to the officers of H.M. Mint, the Solicitor to the Treasury or any person authorised by them to receive them.

### Dangerous Drugs.

(1) "Any constable or other person authorised in that behalf by any general or special order of a Secretary of State shall, for the purposes of the execution of this Act, have power to enter the premises of any person carrying on the business of a producer, manufacturer, seller or distributor of any drugs to which this Act applies, and to demand the production of and to inspect any books or documents relating to dealings in any such drugs and to inspect any stocks of any such drugs." (Dangerous Drugs Act, 1920, section 10, as amended by the Dangerous Drugs and Poisons (Amendment) Act, 1923, section 1).

*Note.*—The writer reads this section as giving power (a) to all constables, without special authority, and (b) to other persons, but only where they have been given special authority. (See *M'Vittie v. Turner*, 80 J.P. 25). The right to inspect books and documents carries with it the right to make notes of their contents. (*Hart v. Cohen & Van Der Laan*, 1902, 4 F. 445), but not to question with a view to eliciting further information.

Article 11 of the Dangerous Drugs Regulations, 1937, deals in detail with the keeping of records by chemists and provides that books are to be kept on the premises "so as to be at all times available for inspection." "At all times" means at all times when the shop is open for business. (*Davies v. Winstanley*, 95 J.P. 21).

(2) Provision for a search warrant is made in section 1 of the Act of 1923, which should be consulted for its precise terms.

### Defence (General) Regulations, 1939.

(1) *Public Shelters.* If a public shelter is not open when it is required to be open by virtue of directions given under the Regulations, a constable may "take such steps and use such force as may be reasonably necessary to enable the shelter to be used in accordance with the directions." (Regulation 23 AC).

(2) *Lights.* If the Lighting Restrictions Order is not complied with in the case of any premises, vehicle or vessel, any constable or member of H.M. Forces may enter the premises or board the vehicle or vessel and take in relation thereto all such steps as may

be reasonably necessary for the enforcement of the order. A constable who has reason to suspect that the order has been, or is being, contravened or not complied with, may take reasonable steps to inspect or examine the vehicle and lamps thereon or therein with a view to ascertaining whether or not there is, or has been, an offence. (Regulation 24).

(3) *Search Warrants.* A general power to justices to grant a search warrant in favour of the police or members of H.M. Forces is given by Regulation 88A, which should be carefully read for its terms. Note that no female may be searched except by a female; also that this power of entry to premises carries with it a right to use such force as is reasonably necessary. (Regulation 89). See also Regulation 88B; which gives power, in certain circumstances, to stop and search vehicles and vessels, and Regulation 42c, article 3.

(4) A power of entry upon lands appears in Regulation 79B, which deals with the slaughter of dangerous or injured animals in the event of hostile attack.

(5) *Affixing of Notices.* A right of entry appears as incidental to the power of affixing notices granted by Regulation 81.

(6) See also Regulation 7 (3)—Signalling; Regulation 9 (3)—Pigeons.

### **Explosives.**

By section 73 of the Explosives Act, 1875, a general power of search is given to a Government inspector and also to any constable or officer of a local authority. Where this power is exercised by a constable or officer of the local authority, he requires special authority either (a) by a justice's warrant "upon reasonable ground being assigned on oath" or (b) where it appears to a superintendent or other officer of police of equal or superior rank or to a Government inspector that the case is one of emergency and that the delay in obtaining a warrant would be likely to endanger life, by a written order from such superintendent, officer or inspector. The search may extend to any place, whether a building or not, and to a carriage, boat or ship. Entry may be at any time, on exhibition of the constable's authority, and "if needs be by force." Samples may be taken of explosives or ingredients or any substances reasonably supposed to be such. When the entry and search have been authorised otherwise than by a justice's warrant, a special report in writing of every act done by the constable or local authority officer and of the grounds for action must be forthwith sent, by the person by whom or under whose authority action was taken to the Secretary of State.

Note that this power was applied, by section 8 of the Explosive Substances Act, 1883, to the provisions of that Act. See section 74 of the 1875 Act for powers of seizure and detention of explosives ; also section 75 for power to inspect wharves, etc.

#### Factories.

The powers of entry and inspection under the Factory Act, 1937, are given to specially appointed Government inspectors ; but note that (section 123) such inspector may take with him a constable if he has reasonable cause to apprehend any serious obstruction in the execution of his duty.

Shops inspectors have the same powers. (Shops Act, 1912, section 13).

#### Firearms.

(1) A sheriff, justice, or magistrate, if satisfied by information on oath that there is reasonable ground for suspecting that an offence under the Firearms Act, 1937, has been, is being or is about to be committed, may grant a search warrant authorising any constable named therein—

(a) to enter at any time any premises or place named in the warrant, if necessary by force, and to search the premises or place and every person found therein ;

(b) to seize and detain any firearm or ammunition which he may find on the premises or place or on any such person, in respect of which or in connection with which he has reasonable grounds for suspecting that an offence under the Act has been, is being or is about to be committed ; and

(c) if the premises are those of a registered firearms dealer, to examine any books relating to the business.

The constable making the search may arrest without warrant any person found on the premises whom he has reason to believe to be guilty of an offence under the Act.

The sheriff, on the application of the chief constable, may order any firearm or ammunition so seized to be destroyed or otherwise disposed of. (Firearms Act, 1937, section 26).

(2) The Act of 1937 imposes a duty on manufacturers and sellers of firearms (to which the Act applies) to keep a register of transactions. Such persons must, on demand, allow any officer of police, duly authorised in writing in that behalf by the chief officer of police, to enter and inspect all stock in hand and must, on request, produce for inspection his register. The written authority must be produced on demand. These provisions do not apply to the

sale of firearms or ammunition by auction in accordance with the terms of a permit under section 7. (Firearms Act, 1937, section 12).

The right to inspect the register carries with it a right to take notes of its contents. (*Hart v. Cohen & Van Der Laan*, 1902, 4 F. 445).

(3) Any officer of police may search for and seize any firearms or ammunition which he has reason to believe are being removed or to have been removed in contravention of an order of the Secretary of State, and any person having the control or custody of any firearms or ammunition in course of transit shall, on demand by a police constable, allow him all reasonable facilities for the examination and inspection thereof and shall produce to him any documents in his possession relating thereto.

Note that the order referred to is not to prohibit the holder of a firearm certificate from carrying with him any firearms or ammunition authorised by the certificate to be so carried. (Firearms Act, 1937, section 18).

#### Fires.

A constable is among the persons who "may enter and if necessary break into any premises or place in which a fire has or is reasonably supposed to have broken out, or any premises or place which it is necessary to enter for the purpose of extinguishing a fire, without the consent of the owner or occupier thereof, and may do all such acts and things as they may deem necessary for extinguishing fire or for protecting from fire any such premises or place or rescuing any person or property therein." (Fire Brigades Act, 1938, section 14).

#### Gun Licences.

Authority is given to a constable, "who may see any person using or carrying a gun," to enter and remain so long as may be necessary upon any lands or upon any premises other than a dwelling-house or the curtilage thereof for the purpose of demanding production of a gun licence in terms of section 9 of the Gun Licences Act, 1870. (Section 10 of the Act of 1870). The word "curtilage" includes outbuildings, offices, yard and enclosed ground adjoining the house.

#### Hotel Registers.

A right of entry is implied by article 7 of the Aliens Order, 1920, which gives the police right to inspect at all reasonable hours registers kept and particulars furnished under that enactment.

The provision applies to any premises, whether furnished or unfurnished, where lodging or sleeping accommodation is provided for reward. Clubs where sleeping accommodation is provided in good faith for members only are exempt.

#### **Immoral Traffic (Scotland) Act, 1902.**

If it is made to appear to a court of summary jurisdiction by information on oath that there is reason to suspect that any house or any part of a house is used by a female for purposes of prostitution and that any male person residing in or frequenting the house is living wholly or in part on the earnings of the prostitute, the court may issue a warrant authorising any constable to enter and search the house and to arrest that male person. (Immoral Traffic (Scotland) Act, 1902, section 1 (2)).

#### **Incitement to Disaffection Act, 1934.**

Provision is made, by section 2, for the issue of a search warrant, which must be consulted for its terms.

Note that section 4 makes important changes in procedure affecting Scotland, where the application for a warrant is made to the sheriff by a procurator fiscal and that special directions are given, in section 4, for the disposal of property which has come into police possession as a result of search and seizure under the warrant.

#### **Licensing (Scotland) Acts.**

(1) *Registered Clubs.* Entry, by force if need be, to a registered club may be authorised by a warrant granted by a magistrate or justice under section 82 of the Licensing (Scotland) Act, 1903. The magistrate or justice must be satisfied by information on oath that the club is so managed or carried on as to constitute a ground of objection to the renewal of its certificate (see section 81) or that a licensing offence is being committed therein. In addition to entering, constables in possession of such a warrant may inspect the premises, take the names and addresses of any persons found on the premises and seize any books or papers relating to the business of the club. (Persons refusing names or giving false names are penalised).

(2) *Unregistered Clubs.* A similar warrant, with similar powers, may be granted on information on oath that exciseable liquor is being sold or supplied or is kept for sale or supply on the premises of an unregistered club. (Section 83 of the 1903 Act). Power to seize the liquor and the vessels containing it may be granted. (Section 83).

(3) *Eating-houses, Temperance Hotels, etc.* A chief constable, superintendent, lieutenant or inspector of police may at any time

enter and inspect any eating-house, temperance hotel, shop or other place, or any boat or vessel, where food or drink of any kind is sold to be consumed on the premises or in which he shall have reason to believe that exciseable liquors are being unlawfully trafficked in. A constable has similar power if in possession of authority in writing from a justice or magistrate or from his chief constable, superintendent, lieutenant or inspector, but the entry must be made "within 8 days from the date of such writing, as may be specially mentioned in such writing." (1903 Act, section 95).

(4) *Hotels and Public Houses, Licensed Grocers' Premises.* Any constable may, without written authority, at any time enter and inspect any licensed inn and hotel or public house in his district. When he has reason to believe that a breach of certificate is being committed, a constable has the same right to enter and inspect a licensed grocer's premises. (Note that there is no power to use force). (1903 Act, section 95).

A constable seeking entrance to licensed premises after hours at a time when the door is locked should make his presence known by loud knocking and should announce his identity. (*Alexander v. Rankin*, 1899, 2 Adam, 687).

(5) *Shebeens.* A shebeen is a "house, room, premises or place in which exciseable liquors are trafficked in by retail without a certificate and excise licence in that behalf." (1903 Act, section 107). A justice or magistrate, on examination on oath of a credible witness who satisfies him that there is reasonable ground for believing that exciseable liquors are being trafficked in in premises not licensed or by a person not having a licence to sell at such premises or that such liquors are illegally kept for sale or for the purpose of being trafficked in at such premises, may grant warrant to a chief constable, superintendent, lieutenant, inspector or sergeant of police, with constables, to enter and search and, if liquors be found exceeding one gallon to seize them and the vessels containing them. Such a warrant continues in force for one month from its date. (1903 Act, section 96).

#### **Lotteries.**

Any justice of the peace (or sheriff), if satisfied by information on oath that there is reasonable ground to suspect that any premises are being used for the purpose of the commission of an offence under Part 2 of the Betting and Lotteries Act, 1934, in connection with a lottery or proposed lottery, may grant a warrant under his hand authorising any constable at any time or times within one month from the date thereof to enter, if necessary by force, the said premises and every part thereof, and to search for and seize

and remove any documents, money or valuable thing found therein which he has reasonable ground to suppose are on those premises for any purpose which constitutes an infringement of any provisions of part 2 of the Act which relate to lotteries. (Section 27 of the Betting and Lotteries Act, 1934, as qualified, in its application to Scotland, by section 31). "Money" includes a cheque, bank note, postal order or money order. (Section 28).

#### **Mental Defectives.**

Section 15 of the Mental Deficiency and Lunacy (Scotland) Act, 1913, in addition to authorising constables to take to a place of safety any persons whom they have reasonable cause to believe to be defectives and whom they find neglected, abandoned, without visible means of support or cruelly treated, empowers a sheriff, on information on oath laid by an officer of, or person authorised by, the local authority concerned, to issue a search warrant. The warrant gives authority to any constable named therein, accompanied by the medical officer of the local authority concerned or any other qualified medical practitioner, to search for the defective named in the warrant (who is believed to be neglected, abandoned or cruelly treated), and if they find that he is neglected or cruelly treated, and is apparently defective to take him to and place him in a place of safety until proceedings can be taken under the Act. Entry may be made by force, if need be, to any house, building or other place specified in the warrant. A "place of safety" is defined, in section 76, as any poorhouse or police station, any institution, any place of detention, and any hospital, surgery or other suitable place, the occupier of which is willing to receive temporarily such persons. "Institution" means a state or certified institution.

#### **Merchandise Marks Act, 1887, section 12.**

When proceedings under the Act have been initiated, either by summons or warrant to arrest, a sheriff may grant warrant to a constable named therein to search for and seize goods by means of, or in relation to which, the offence has been committed, provided that the goods are reasonably suspected to be in the accused's house or premises or otherwise in his possession or under his control in any place. In Scotland, section 12 must be read along with section 21.

#### **Methylated Spirits.**

Any police officer has power at all reasonable times to enter any premises in which he has reason to believe methylated spirits or surgical spirit are sold or exposed for sale by retail and to

inspect any book required by section 1 of the Methylated Spirits (Sale by Retail) (Scotland) Act, 1937, to be kept. (Section 4).

### **Musical Copyright Act, 1906, section 2.**

A sheriff or magistrate, after information on oath, is empowered to grant warrant authorising the constable named therein to enter the premises specified between 6 a.m. and 9 p.m., by force if need be, and to seize copies of musical work and plates in respect of which he has reasonable ground for suspecting that an offence against the Act is being committed.

### **Official Secrets Acts.**

If a justice of the peace is satisfied by information on oath that there is reasonable ground for suspecting that an offence under the Official Secrets Acts has been or is about to be committed, he may grant a search warrant authorising any constable named therein to enter at any time any premises or place named in the warrant, if necessary by force, and to search the premises or place and every person found therein and to seize any sketch, plan, model, article note, or document or anything of a like nature or anything which is evidence of an offence under the Acts which he may find and with regard to or in connection with which he has reasonable ground for suspecting that an offence under the Acts has been or is about to be committed.

When it appears to a superintendent of police that the case is one of great emergency and that in the interests of the state immediate action is necessary, he may by a written order under his hand give to any constable the like authority. (Official Secrets Act, 1911, section 9). The operation of this section is suspended during the continuance in force of Regulation 88A of the Defence (General) Regulations, 1939.

### **Pawnshops.**

There would not seem to be any express power enabling the police to enter pawnshops, but such a power would seem to be implied in the terms of section 437 of the Burgh Police (Scotland) Act, 1892—pawnbroker to produce books, etc., on demand, during hours of business, by a constable.

Where a pawnbroker has taken in pawn any linen or apparel or unfinished goods or materials entrusted to any person to wash, scour, iron, manufacture, work up, finish or make up, the owner of such articles (or of any other articles unlawfully pawned) may make an oath before two justices, a sheriff or a magistrate who, if satisfied, may grant warrant to search, within hours of business, the shop of the pawnbroker. If the pawnbroker, on request by a

constable authorised by the warrant, refuses to open the shop and permit it to be searched, the constable may break it open within the hours of business, doing no wilful damage. (Pawnbrokers Act, 1872, section 36). The phrase "unfinished goods or materials" is defined in section 5. The constitution of the court by which the warrant may be granted is regulated, in Scotland, by section 56.

#### **Petroleum.**

The police are not expressly mentioned in section 18 of the Petroleum (Consolidation) Act, 1928, but a search warrant under that section might well be in favour of a constable.

#### **Post Office Act, 1908, section 44.**

On vacating office, an officer of the post office is under obligation to surrender his uniform, etc. A justice of the peace may issue a warrant to search for and seize any articles not delivered up. The warrant may be executed by the police in like manner as if the goods were stolen and the warrant were a warrant to search for stolen goods.

#### **Prevention of Crimes Act, 1871, section 16.**

This section confers upon the police a power of search for stolen goods which is more informal and more drastic than that given by the application to a magistrate for a search warrant explained earlier in this chapter.

When (1) the premises to be searched are, or within the preceding twelve months have been, in the occupation of any person who has been convicted of receiving stolen property or of harbouring thieves or (2) the premises to be searched are in the occupation of any person who has been convicted of any offence involving fraud or dishonesty and punishable by penal servitude and imprisonment, a chief constable may authorise, in writing, any constable to enter any such house, shop, warehouse, yard or other premises in search of stolen property and to seize and secure any property he may believe to have been stolen in the same manner as he would be authorised to do if he had a search warrant and the property seized, if any, corresponded to the property described in such warrant. The authority given by the chief constable need not specify any particular property, but he may give such authority if he has reason to believe generally that such premises are being made a receptacle for stolen goods. (Note that this section, although repealed in its application to England by the Larceny Act, 1916, still remains unrepealed in its application to Scotland).

### **Public Order Act, 1936.**

Where, on application by the procurator-fiscal, a sheriff is satisfied, by information on oath, that there is reasonable ground for suspecting that an offence under section 2 of this Act has been committed and that evidence is to be found at any premises or place, he may grant warrant to a police officer of rank not lower than that of inspector, authorising him, any other persons named and any other officers of police to enter at any time within one month from the date of the warrant, if necessary by force, to search the place and persons found therein, and to seize anything reasonably suspected to be such evidence. No woman is to be searched except by a woman. (Public Order Act, 1936, section 2—modified, in its application to Scotland, by section 8. (Section 2 is directed against quasi-military organisations).

### **Salmon Fishing.**

By section 27 of the Salmon Fisheries (Scotland) Act, 1868, power is given to certain persons, including "any police officer," to enter and remain upon any lands in the vicinity of any river or of the sea coast during any hour of the day or night for the purpose of preventing a breach of the provisions of the Acts relating to salmon fishing or of detecting the persons guilty of the breach ; and no such persons entering and remaining upon such lands as aforesaid shall be deemed to be trespassers ; provided that the owner or occupier of the land may require such persons to quit and such persons, if they refuse, may be dealt with as trespassers unless they can show that they had reason to believe that a breach of the law had been, or was about to be, committed.

A warrant to search premises may be granted to the police under section 26. See also section 70 of the Salmon and Fresh Water Fisheries Act, 1923.

As to seizure of nets, instruments, fish, etc., under section 28 of the Act of 1868, see the next chapter.

### **Sea Fisheries.**

Section 21 of the Sea Fisheries Regulation (Scotland) Act, 1895, empowers any sheriff or two justices, upon information on oath that there is probable cause to suspect a breach of a bye-law to have been committed, or that any sea fish or instrument liable to be forfeited in pursuance of such bye-law is concealed on any premises, by warrant to authorise any fishery officer or any constable to enter the premises for the purpose of detecting the

offence or the concealed fish or instrument at such time or times in the day or night as in the warrant may be mentioned and to seize any such fish or instrument found. The warrant continues in force for not more than a week from its date.

### **Spirits Act, 1880.**

Section 140 of this Act, as amended by the Inland Revenue Act, 1898, section 14, authorises the issue of a warrant to enter and search for illicit stills and spirits. Force may be used and any still, vessel, utensil, spirits or material for the manufacture of spirits may be seized. If the search is unsuccessful, any damage done must be made good. The warrant may be in favour of an inland revenue officer or customs officer or (by virtue of the Act of 1898) "any officer of the peace." Entry may be made by night as well as by day, but, if at night, an officer of the peace must be present. Any officer of the peace wilfully refusing or neglecting to aid in the execution of the Act is subject to a penalty. (Section 153).

### **Tracks.**

Any constable may at all reasonable times enter upon any track for the purpose of ascertaining whether the provisions of Part 1 of the Betting and Lotteries Act, 1934, are being complied with. (Betting and Lotteries Act, 1934, section 19). "Track" means premises on which races of any description, athletic sports or other sporting events take place. (Section 20).

### **Weights and Measures.**

Section 430 of the Burgh Police (Scotland) Act, 1892, empowers the chief constable or any constable specially appointed by him to perform the duty to enter premises where articles are sold by weight, measure or numbers and require such articles to be weighed, measured or numbered in his presence. Where the weight, etc., does not correspond with the representation made, power of seizure is given. The section should be consulted for its precise terms.

### **Wireless Telegraph Station (Unlicensed).**

Section 1 (4) of the Wireless Telegraphy Act, 1904, provides for the issue of a warrant to enter, inspect and seize. The warrant may be granted to any police officer, but also (and more commonly) to other officials.

### Wrecks.

Police officers, in common with all other persons, have the right of entry upon lands detailed in section 513 of the Merchant Shipping Act, 1894. This right arises when a vessel is wrecked, stranded or in distress on or near the coasts of the United Kingdom or in tidal waters within the U.K. To render assistance to the vessel or save the lives of shipwrecked persons or save the cargo or apparel of the vessel, any person may, unless there is some public road equally convenient, pass and repass, with or without carriages or horses, over any adjoining land, "so that they do as little damage as possible." The owner or occupier of the lands must, on request, open gates and must not impede the work. Salvaged articles may be left on the land for a reasonable time until they can be removed to a safe place of public deposit. For the application of these provisions to aircraft, see the Air Navigation Act, 1920, section 11, and the Aircraft (Wreck and Salvage) Order, 1938.

## CHAPTER XIII

## THE POLICE AND PROPERTY

IN a variety of ways, articles which are private property may come into police hands. This may happen either (1) on police initiative—as in the case of stolen goods seized on a search warrant or (2) through the action of a member of the public, as in the case of found property handed in at a police station. In this connection, questions of importance and difficulty fall to be discussed. In what circumstances are the police within their rights in seizing and retaining, at least for a time, articles belonging to (or in the possession of) a suspect, an innocent third party or some person unknown? What action must be taken to trace the owner and safeguard his interests? How, in the end of the day, when the purpose of police possession has been served, should the property be disposed of? When there are competing claims, to whom should it be delivered?

**Seizure of Property by the Police.**

(1) We have already seen (chapter 9) that a suspect, being arrested, may be searched and how articles found on him should be dealt with.

(2) The rights of the police, on the arrest of a person on a grave charge, such as murder, immediately to search for and seize articles under his control which are relevant to proof of his guilt (or innocence); their powers under a warrant to search for such articles or for stolen goods; and the numerous statutory powers of entry, search and seizure have been explained in the immediately preceding chapter.

(3) In many cases (ignored in the preceding chapter because no entry of premises is involved) special powers of seizure are conferred by statute. A list of the more important of these is given at the end of this chapter.

(4) In all cases where a court has power to forfeit articles, seizure may be made by the police (or other officials charged with the execution of the statute contravened). This doctrine was clearly laid down in *Mauchline v. Stevenson*, 1878, 4 Couper 20, cited and approved in *Bell v. Leadbetter*, 1934, J.C. 74. The right of seizure (in the absence of an express statutory power of search or of a warrant) is confined to articles liable to forfeiture which can be seen by the investigating officers. It follows that the police, when they have secured evidence of a contravention of

the Gaming Machines (Scotland) Act, 1917, may seize the machine concerned if they see it on the shop counter on their visit at the time of the offence, for such a machine may be forfeited in terms of the Summary Jurisdiction (Scotland) Act, 1908, section 44. If, however, the police were not present at the time of the offence or immediately thereafter, the better procedure would be to apply for a warrant.

**Property coming into Police Hands (otherwise than by Seizure).**

1. *Brokers.* A broker, on being informed by the police that any goods in his possession have been dishonestly appropriated, must deposit the goods with the chief constable "in order that they may be produced in such manner as may be necessary for the ends of justice, or upon proof of ownership, to the satisfaction of the magistrate, restored to the proper owner thereof." (Burgh Police (Scotland) Act, 1892, section 436).

2. *Pawnbrokers.* Every pawnbroker must at all times during his hours of business produce on demand to the police his books and exhibit "all goods regarding which information shall have been given tending to show or to render probable that the same have been stolen, embezzled or fraudulently taken, and if required shall deposit the same with the chief constable for the ends of public justice, on receiving a receipt for such goods." (Burgh Police (Scotland) Act, 1892, section 437).

3. *Lost Property.* Section 412 of the Burgh Police (Scotland) Act, 1892, places upon "every person finding any goods, articles or money" the duty of reporting the fact to the police and depositing with them the article found within 48 hours of the finding. If, within six months from the date of the report and deposit, the article is not claimed by an owner who can prove his ownership to a magistrate's satisfaction, the magistrate may award the article to the finder under deduction of expenses incurred for advertising for the owner. If the owner appears and proves his ownership, the magistrate must order the article to be delivered to the owner, under deduction of such expenses and such reward to the finder as in the circumstances the magistrate shall determine. If no owner comes forward and proves his ownership, and the finder cannot, within six months and after notice, be found, the magistrate may order the article to be sold and the proceeds "applied to the purposes of this Act"—i.e., paid into the burgh funds. By an Act of 1925, this section was applied to Lanarkshire.

Corresponding, but not necessarily identical, provisions are to be found in local police Acts.

4. *Stray Dogs.* The finder of a stray dog must forthwith either (a) return the dog to its owner, or (b) take it to the nearest police

station, or (c) take it to an animal post within three miles of the place where it was found—an alternative allowed, during the present emergency, by the Defence (General) Regulations, 1939, 25B.

When the dog has been taken to a police station—(a) If the finder desires to keep the dog, the police are under obligation to make out in duplicate a certificate setting out the particulars—description of dog, where found, date on which brought to police station, name and address of finder. (See, for the form of the certificate, S.R. & O., 1928, No. 612). One copy is given to the finder and the other retained. The finder may then remove the dog but is under obligation to keep it for not less than one month. (b) If the finder does not desire to keep the dog, it is treated as if seized by the police. (See list at the end of this chapter.) (Dogs (Amendment) Act, 1928, section 4.)

### The Rights of the Owner.

The owner of property cannot, by the mere fact that it has passed from his possession through his own negligence or the dishonest act of some other person, be deprived of his right to have it back. No matter where the article may be located by him—whether in police hands or in a pawnshop or in a broker's premises or in the possession of the thief or the finder or some innocent third party—the owner may claim it unconditionally.

To this rule there are certain exceptions.

(1) Where property is in the hands of the criminal authorities, or in police hands on behalf of the criminal authorities, it may be retained, in face of a demand by the owner for its immediate return, so long as the interests of justice require. So stolen property seized under a search warrant (to take only one instance of many) may be held by the police until it is clear that its production in court will no longer be required. If, however, (a) the criminal authorities decide not to proceed or (b) a plea of guilty has been tendered and the thief dealt with or (c) the trial has been concluded and the accused sentenced, the owner's right to immediate and unconditional delivery of his property may be asserted—if need be, by an action of delivery at his instance.

(2) Where the property has been sold under the express terms of an Act of Parliament, this must have the effect of extinguishing the rights of the original owner—for power to sell implies power to pass to the purchaser a title against all comers. Instances are found in the power of the police to sell stray dogs and lost property, as explained in this chapter. Provided that the statutory preliminaries have been strictly observed, the purchaser at such statutory sales acquires complete ownership.

(3) The rights of the owner may be defeated by the court's action in declaring forfeited, or ordering the destruction of, an article. Most prosecutions under the Gaming Machines (Scotland) Act, 1917, are directed against shopkeepers who do not own the machines used by them; but it could not be suggested that the court had no power to apply section 44 of the Summary Jurisdiction (Scotland) Act, 1908. No doubt, in such a case, the owner might appear and protest and might (e.g., by giving an undertaking that the machine would not in future be used for gaming) prevail upon the magistrate not to exercise his power of forfeiture or destruction. A court would be bound to listen to such a representation but, having done so, might ignore it.

(4) Before handing over to an owner property in their possession, the police must (1) be satisfied that the claimant is really the owner, (2) see that he has complied with all statutory requirements—e.g., that he has paid the expenses and award due on lost property, and (3) take from him a receipt.

(5) Where perishable goods have come into police possession, the owner being unknown, application may be made for a warrant to sell and to hold the proceeds in trust for the owner. In Edinburgh the chief constable may, without the intervention of a magistrate, sell perishables handed in as found property or order their destruction (Edinburgh Corporation Order, 1933, section 132); while, in the case of unclaimed stolen goods, perishables may be sold under the procedure in section 415 of the Burgh Police (Scotland) Act, 1892.

Apart from such exceptions as are set out above, the right of ownership is paramount. It cannot be defeated by statutory provisions designed to regulate interim possession, or which empower a court to impose conditions to be fulfilled before delivery. This is illustrated by the recent Scottish decision in *Robertson v. Burns and Robertson*, 1943, S.L.T. 121, and by the English decision of *Leicester v. Cherryman*, 1907, 2 K.B. 101.

In the Scottish case, Mrs. Robertson, a saleswoman in a large Glasgow store, left her fur coat in the staff cloakroom and later discovered that it was missing. The police were informed. They circulated to pawnbrokers and others a description of the coat, which was located in the premises of a pawnbroker named Burns, who had accepted it in pawn on the date of theft and had made an advance of £9 on its security. The coat was taken possession of by the police under the powers conferred by section 88 of the Glasgow Police Act, 1866. The name and address given by the pledger were fictitious and the thief was not traced. Mrs. Robertson

claimed the coat from the police, the pawnbroker's attitude being that he neither denied nor admitted that it was her property. In these circumstances, the City Procurator-Fiscal presented to a magistrate a petition under section 101 of the Act of 1866, which empowers a magistrate, in cases of doubtful or disputed ownership, to order property to be delivered to such person as he may direct, subject to all legal claims against such person in regard to the same ; and where the same is lawfully in the possession of any person he may order compensation to be paid, by the person to whom it is to be delivered, to the holder thereof as a condition of such delivery. On this application, the magistrate found that the fur coat was Mrs. Robertson's property and that it was lawfully in Burns' possession, and ordered the coat to be handed over to Mrs. Robertson and "that the said Peter Burns be paid the sum of £4 10s. by Mrs. Robertson." On appeal, it was held that the magistrate was entitled to make it a condition of delivery of the coat that compensation should be paid to the pawnbroker but that he had no right to make a declaratory finding of ownership.

The importance of this decision lies in the opinions of the High Court judges who, while generally approving of the magistrate's order, made it clear that (1) all that the magistrate could do was to regulate interim possession of the coat, saying to Mrs. Robertson, "If you wish your coat now, you must first pay the pawnbroker," and (2) Mrs. Robertson was free to refuse to reimburse the pawnbroker (in which case, she could not at once have her coat back) and to raise, in a civil court, an action for delivery of her property unconditionally.

These opinions are in line with the decision of an English Divisional Court in *Leicester v. Cherryman*, 1907, 2 K.B. 101. An agent of Leicester & Co. had been convicted of stealing jewellery, the property of the company, which he had pawned. On the application of the police officer in charge of the case, the court made an order under section 30 of the Pawnbrokers Act, 1872, for return of the goods to the company on payment of the amount of the loan. The company's representative was present at the hearing of this application and at the making of the order, but neither supported nor opposed the application. The company did not comply with the order, but raised an action in a civil court craving return of the goods, and obtained judgment. "The view I take of this matter," said Ridley, J., "is that none of the Acts dealing with the restitution of stolen property were intended to alter the civil rights of the parties as they existed."

#### To whom should Property be delivered ?

The police are often in doubt as to the ultimate disposal of articles which have come into their possession and which are not

covered by the statutory provisions regulating the destination of found property, unclaimed stolen property and the like. Should it be returned to the person from whom it was taken?

Little difficulty should be experienced if the following two rules are kept in mind. (1) In the absence of any competing claim, the article should be handed back to the person in whose possession it was immediately before it passed to the police. (2) If another claimant, who avers ownership, has come forward and intimated his claim to the police, the proper course is (a) to retain the article if there is any real doubt as to the validity of the claim or (b) if the claimant can substantiate his ownership beyond any reasonable doubt, to hand it to him on his receipt.

On 17th May, 1901, a man named Winter bought a gig at Newton Fair. The gig disappeared and was traced to the possession of a man named Broderick, who was prosecuted at Liverpool Quarter Sessions for larceny, but acquitted, on 17th July. On the day of the acquittal, Broderick's solicitor wrote the officer in charge at Newton Police Station, who had control of the gig, demanding its return. Next day, Winter's solicitor wrote claiming that the gig was still his property and asking that it should not be given to anyone else. Winter followed this up by personally demanding the gig on two occasions—to which demands the retort of the police officer concerned was "No, I'm going to give it to Broderick." On 21st July, he did deliver the gig to Broderick; whereupon Winter raised an action against the police officer, who was found liable in trover—i.e., was found liable in damages. This judgment was sustained on appeal, on the ground that the police officer was "a party dealing with the plaintiff's property" and that "he acted at his peril." (*Winter v. Bancks*, 1901, 65 J.P. 468).

In 1889, a firm of manufacturers presented to the sheriff in Glasgow a petition, in which the respondents were the police custodian of property and certain pawnbrokers. The petition craved delivery of articles stolen by an employee, who had been convicted of stealing them. The sheriff dismissed the petition on the view that, if the crave were granted, the police custodian might be exposed to the risk of future claims and that the usual and proper course, when competing claims had been made to property, was an action of multiplepoinding. The sheriff principal agreed. On appeal to the Court of Session, however, it was held that the prayer of the petition should have been granted. (*Eaglesham v. Dickson*, 1889, 16 R. 557).

In 1895, B, a servant of A, stole A's horse and mare. He sold the horse to C and the mare to D. On complaint to the police, they took possession of the animals and gave them to A, directing

him to hold them until the purposes of the criminal authorities had been served. No charge of theft was brought, the papers being marked "no proceedings" by the criminal authorities. The procurator-fiscal then presented to the sheriff a petition asking for warrant to take the animals from A and return them to C and D, leaving any question between them to be decided in a civil action. (A had declined to give them up.) The petition was dismissed because it was not in proper form; but the sheriff said that, even if it had been in proper form, the question was a civil one and the procurator-fiscal had no title to raise the matter. (*Jameson v. Stewart*, 1895, Sc. Law Review (Sh. Ct.), 128).

On 13th June, 1938, a man named Guthrie bought from a dealer a second-hand car. The price arranged was £120, and Guthrie made out and handed to the dealer a cheque in payment. Two days later he sold the car for £100. On presentation, the cheque was dishonoured, Guthrie having no account at the bank on which it was drawn. On 18th June, Guthrie was arrested on a charge of fraud and was found to have in his possession £68 10s., which was retained by the police. Guthrie was sentenced to six months imprisonment.

Several claims were made to the money in police hands. (1) Guthrie's wife, who held decrees against him, arrested, in the hands of the chief constable, monies due by him to Guthrie up to the amount of the decrees and followed this up by raising an action of forthcoming—i.e., an action against the chief constable craving for payment to her of the amount in the decrees. (2) The motor dealer intimated to the chief constable a claim for payment of the whole amount. (3) Another creditor intimated a claim. (4) Guthrie wrote from prison to the chief constable demanding his money.

Faced with these competing claims to the money in his hands, the chief constable raised an action of multiplepounding—that is to say, he paid the money into court and asked for a ruling.

Sheriff Robertson, in Edinburgh sheriff court, held that the arrestments placed by Guthrie's wife were incompetent; that the creditors' claims must be rejected; and that Guthrie was not, by the fact of arrest, deprived of his legal possession to the money found on him and was entitled to have it returned to him or to his accredited agent. (*Guthrie v. Morren*, 1940, S.L.T. (Sh. Ct.) 33).

#### STATUTORY POWERS OF SEIZURE.

##### **Aliens.**

Power to seize letters, etc., found in possession of an alien landing in the United Kingdom are fully set out in the next chapter under the heading "Aliens."

### Cattle (Straying).

Powers to seize cattle found at large in any street of the burgh, without any person having the charge thereof, is given to any constable "if he cannot readily find the owner thereof." Cattle seized under this power must be impounded and may be detained until the owner pays a penalty not exceeding forty shillings and the reasonable expenses of impounding and keeping the cattle. If the penalty and expenses are not paid within three days, the cattle may be sold after seven days' notice to the owner, if known, or newspaper advertisement. (Burgh Police (Scotland) Act, 1892, sections 386-7). "Cattle" includes any horse, mare, gelding, foal, colt, filly, bull, cow, heifer, ox, calf, ass, mule, ram, ewe, wether, lamb, goat, kid or swine. (Section 4).

It should be noted that the powers of seizure of straying animals in section 103 of the General Turnpike Act, incorporated in the Roads and Bridges Act, 1878, rests with road trustees and surveyors and not with the police. The section, however, allows these officials to authorise other persons to exercise the power.

### Cattle (Diseased).

Powers of seizure are to be found in section 428 of the Burgh Police (Scotland) Act, 1892.

### Coinage Offences Act, 1936.

In addition to the power of search and seizure under warrant mentioned in the preceding chapter, one finds, in section 11, a general power of seizure enforceable by any person whatsoever who finds in any place whatsoever, or in the possession of any person without lawful authority or excuse (a) any false or counterfeit coin resembling any current coin, (b) any instrument, tool or engine adapted and intended for the counterfeiting of such coin, or (c) any filings or clippings or any gold or silver bullion or any gold or silver in dust solution or otherwise which have been produced or obtained by diminishing or lightening any current gold or silver coin.

### Dogs (Stray).

Where a police officer has reason to believe that any dog found in a highway or place of public resort is a stray dog, he may seize the dog and may detain it until the owner has claimed it and paid all expenses incurred by reason of its detention. Where any dog so seized wears a collar having inscribed thereon or attached thereto the address of any person, or the owner of the dog is known, the chief constable, or any person authorised by him in that behalf, shall serve on the person whose address is given on the collar, or

on the owner, a notice in writing stating that the dog has been so seized and will be liable to be sold or destroyed if not claimed within seven clear days after service of the notice. (Meantime, the period is reduced to three days—Regulation 25B of the Defence (General) Regulations, 1939). Service of the notice may be effected (a) by personal delivery, (b) by leaving it at the usual or last known place of abode or at the address given on the collar, or (c) by post. If not claimed, or if all expenses are not paid, within seven (meantime three) days of the seizure or service of the notice, as the case may be, the police may cause the dog to be sold or destroyed in a manner to cause as little pain as possible. It must not be sold for vivisection. A register of dogs seized must be kept by the chief constable, containing a brief description of the dog, date of seizure and manner of disposal, and such register must be open to inspection at all reasonable times by any member of the public on payment of one shilling. If the dog is transferred to an establishment for the reception of stray dogs, a similar register, open to inspection on similar terms, must be kept there. Whether in police hands or at a dogs' home, the dog must be properly fed and maintained. (Dogs Act, 1906, section 3).

The duties of the finder of a stray dog are explained elsewhere in this chapter. It is, in the writer's view, improper for a police officer finding a stray dog—whether, when he does so, he is on or off duty—to claim the privileges of such finder under the Dogs (Amendment) Act, 1928.

Note that any dog in respect of which an offence is being committed against the Control of Dogs Order of 1930 or any Regulation made thereunder may be seized and treated as a stray dog. This authorises the seizure of (1) a dog found in a public place without a collar ; (2) a dog so found with a collar, but no name and address of the owner on the collar or a plate or badge attached thereto ; and (3) where a local regulation is in force, a dog unaccompanied at night.

#### Dogs (Vicious, etc.).

Any constable may seize and take possession of any dog or other animal which is a nuisance or annoyance to the inhabitants in the neighbourhood and which has not been removed under a magistrate's order ; also any ferocious, rabid or vicious dog, which is not muzzled ; also dogs not confined after notice given by the magistrates ; and the chief constable may cause to be destroyed any dog so seized and any dog reasonably suspected to be in a rabid state or which has been bitten by another dog reasonably suspected to be in a rabid state. (Burgh Police (Scotland) Act, 1892, section 389).

### Fatal Accidents.

Section 5 of the Fatal Accidents Inquiry (Scotland) Act, 1895, authorises the sheriff at, or at any time subsequent to, the presentation of a petition, to grant warrant to officers of the law to take possession of and to hold in safe custody, subject to the inspection of parties interested, any article or thing which it may be considered necessary to produce at the enquiry.

### Firearms.

Section 6 of the Firearms Act, 1937, empowers any constable to demand from any person whom he believes to be in possession of a firearm or ammunition to which Part 1 of the Act applies the production of his firearm certificate. If such person fails to produce the certificate or to permit the constable to read it or to show that he is entitled to have the firearm or ammunition without a certificate, the constable may seize and detain the firearm or ammunition.

### Furniture (Removal at Night).

Any constable may stop and convey to the police office and there detain, until due enquiry can be made, any cart or carriage, and any person in charge thereof or connected therewith, found within the burgh employed in removing furniture, or any person carrying furniture, between 8 p.m. and 6 a.m., except at the usual terms of removing observed within the burgh. (Burgh Police (Scotland) Act, 1892, section 388).

### Musical Copyright.

See section 1 of the Musical (Summary Proceedings) Copyright Act, 1902, for seizure of pirated copies on order of a court and for seizure of pirated copies which are being hawked.

### Obstruction of Street.

"If any matter or thing whatever shall be placed or allowed to remain in any street to the obstruction, annoyance or danger of the residents or passengers, it shall be lawful for the chief constable or other constable to remove or cause the same to be immediately removed to any place of safety, there to remain at the risk of the owner and person offending and to detain the same until the expenses of removal and detention are paid; and if such expenses are not paid within seven days, to sell or dispose of the same and apply the proceeds as the magistrate shall direct." (Burgh Police (Scotland) Act, 1892, section 383).

### **Persons taken into Custody (Horse, etc., in Charge of).**

When a person having charge of any horse, cart or carriage, or any animal or thing is taken into custody, a constable may take charge of the horse, etc., and deposit it in a place of safe custody, unless it can be conveniently and safely given up to a known owner. Unless claimed within four days by the owner and unless all expenses are paid, any two magistrates, after notice to the owner, if known, have power of sale. (Burgh Police (Scotland) Act, 1892, section 468). See also Protection of Animals (Scotland) Act, 1912, section 11.

### **Poaching Prevention Act, 1862.**

A constable may, in any highway, street or public place, search any person whom he may have good cause to suspect of coming from any land where he has been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of a gun, or nets or engines used for killing or taking game, and also may stop and search any cart or other conveyance in or upon which he has good reason to suspect that any such game or article is being carried by any such person. Such game or article, if found, may be seized and detained.

### **Road Traffic Acts.**

A constable who has reasonable cause to believe that any licence or certificate of insurance or certificate of security produced to him in pursuance of the provisions of the Road Traffic Act, 1930, by the driver of a motor vehicle is false, he may seize the document. (Section 112). See also section 34 of the Road and Rail Traffic Act, 1933, in which the term "document," as there used, includes a plate, and the power to seize includes power to detach from the vehicle.

### **Salmon Fishing.**

A constable is among the persons authorised, by section 28 of the Salmon Fisheries (Scotland) Act, 1868, to search boats, nets, baskets, bags, etc., used in fishing for salmon, or which he has reason to suspect may contain salmon caught illegally, and to seize all illegal nets, or nets being used illegally, and other instruments of fishing and all fish and other articles liable to forfeiture under the Act. See also section 25.

Powers of seizure, in reference to premises raided under a search warrant, are to be found in section 26.

### **Stolen Goods (Unclaimed).**

Section 415 of the Burgh Police (Scotland) Act, 1892, empowers the chief constable to take possession of "all goods, articles or money known or alleged to have been stolen or unlawfully obtained, and of which the owner may be unknown or which may be unclaimed. The section also empowers a magistrate, after the expiration of twelve months (or, in the case of perishables, after such period as he shall think fit), if during that period no owner has claimed the property, to grant warrant for the sale or disposal of the goods, articles or money, the proceeds to be applied "to the purposes of this Act"—i.e., paid into public funds. Except in the case of perishables, notice of sale must be given in two or more newspapers published or circulating in the burgh, as the magistrate may direct. It is not necessary that any apprehension shall have taken place or that any formal charge shall have been made against any person for having stolen or unlawfully obtained the goods, etc.

Note the terms of the immediately preceding section, which requires the police to keep a written record of stolen or unclaimed goods brought to a police office, the names of the parties from whom they were taken or by whom they were pledged or brought to the police office, the date and the manner of retention until disposed of.

Section 467 of the Act of 1892 gives a general power to seize stolen goods.

### **Street Betting.**

A constable has power to seize and detain "all books, cards, papers or other articles relating to betting" found in possession of a street bookmaker whom he has arrested. (Street Betting Act, 1906, section 1).

## CHAPTER XIV

### MISCELLANEOUS POWERS UNDER STATUTE.

IN addition to the statutory powers of arrest, entry, search and seizure set out and discussed in the earlier chapters, the police have, under statute, a variety of powers denied to the private citizen. A list of the more important of these powers and of those most commonly taken advantage of in everyday practice is given below. For convenient reference, an alphabetical arrangement has been adopted.

#### **Air Force.**

Generally, the law as to billeting, impressment, deserters, absentees, etc., applicable to persons subject to military law applies also to members of the Air Force. See under "Army."

#### **Air Navigation Acts and Orders.**

Civil aviation is regulated in this country by the Air Navigation Acts, 1920 to 1938, and Orders made thereunder. The principal Order is the Air Navigation (Consolidation) Order, 1923, which has been repeatedly and extensively amended by subsequent Orders. The Acts have no application to naval, military or Air Force aircraft, but may, by Order in Council, be applied, with or without modification, to Crown aircraft. The following is a summary of the main powers and duties conferred on the police :—

##### **(1) Access.**

A police constable has right of access at all reasonable times to any place to which access is necessary for the purpose of carrying out his powers under the Order of 1923, as amended. (Article 8).

##### **(3) Accidents.**

The procedure on the occurrence of an accident involving an aircraft is regulated by the Air Navigation (Investigation of Accidents) Regulations, 1922, as amended. The Regulations do not apply to naval, military or Air Force aircraft.

1. *Reporting.* In general, where an accident involves death, personal injury or serious structural damage to the aircraft, or where it is believed to be caused by failure in the air of any part of the aircraft, the pilot or (if he is incapacitated by injury) the owner or hirer must (1) send notice to the Air Ministry and (2) notify the local police. The regulations prescribe a time limit of

24 hours (unless it is impossible to comply) within which "the notice is to be sent." It is not clear whether this time limit applies to the notification to be given to the police.

An exception is made in favour of aircraft neither (a) carrying passengers or goods for hire or reward, nor (b) being used for the purposes of any trade or business or for gain, nor (c) carrying passengers for instruction in flying for which payment is made. Accidents involving such aircraft need be reported only if they involve death or serious personal injury.

*2. Goods and Baggage.* Where an aircraft has been involved in an accident, goods and baggage may be removed from the aircraft under the supervision of a police officer; but, if it has come from outside the United Kingdom, must not be removed from the vicinity except on clearance or with the consent of an officer of Customs and Excise.

#### (3) Compliance with Police Orders.

An aircraft must comply with such orders as may be lawfully given in regard to it by officers of police or of Customs and Excise. (Order of 1923, article 4).

#### (4) Detention of Aircraft.

In relation to the use of Customs aerodromes, the term "authorised person," as it appears in article 10 of the Order of 1923, includes a police officer. This has the effect of empowering a police officer, when it appears to him that an aircraft is intended or likely to be flown in contravention of certain specified provisions or so as to infringe any other parts of the Order and to be a danger to persons or property, to detain the aircraft. To appreciate the precise extent of this power, article 10 and the parts of the Order mentioned therein must be read carefully.

#### (5) Documents, Production of.

(1) The person in charge of an aircraft must, on demand made on the landing or departure of the aircraft by an authorised person (which includes a police officer) produce to that person any of the following documents relating to the aircraft or its personnel—

Its certificate of registration; its certificate of airworthiness and, in the case of a British aircraft registered in Great Britain and Northern Ireland, any other certificate required to be carried; the certificates of competency and licences of the personnel; its journey log book, in all cases in which it must be carried; any licence to use wireless apparatus; if engaged in international

navigation and carrying passengers, a list of their names ; if so engaged and carrying freight, the bills of lading and manifest in respect thereof. In the case of a British aircraft registered in Great Britain and Northern Ireland and not engaged in international navigation, it is sufficient if the documents are produced within five days at a police station specified by the person in charge at the time of the demand—but this concession does not apply to the certificate of airworthiness, etc., and the certificates of competency and licences of the personnel in the case of a public transport aircraft or an aerial work aircraft.

(2) The owner of a British aircraft registered in Great Britain and Northern Ireland must, on demand by an authorised person (which includes a police officer) produce or cause to be produced within a reasonable time to that person any certificate of registration or airworthiness for the time in force ; any certificate issued or load sheet completed within six months before the date of demand ; any journey log book or other book required to be kept wherein an entry was made within the period of two years before the date of demand ; any licence to use wireless apparatus in the aircraft for the time being in force.

(3) The holder of any licence under the Order of 1923 and any person required by the Order to be provided with a licence must, on demand by an authorised person (which includes a police officer) produce the licence. In certain cases, production within five days is accepted.

(4) A pilot licensed under the Order of 1923 must, on demand by an authorised person (which includes a police officer), produce or cause to be produced within a reasonable time to that person any pilot's log book kept by him wherein an entry was made within the period of two years before the date of the demand.

(Article 17 of the Order of 1923, as amended). See also below, under the heading "Report to the Police."

#### **(6) Report to the Police.**

An aircraft arriving from a place outside Great Britain and Northern Ireland in any place other than a customs aerodrome must report forthwith to an officer of Customs and Excise or police constable and must, on demand, produce the journey log book. No goods may be unloaded without the consent of an officer of Customs and Excise and no passengers may leave the immediate vicinity without the consent of an officer of Customs and Excise or a police constable. (Order of 1923, schedule 8, article 21).

### Aliens.

Any alien to whom leave to land has been refused ; any alien who, not having been granted leave to land, is found on shore in the United Kingdom ; and any alien seaman who, having been granted temporary shore leave during his ship's stay in port, is reasonably suspected of having acted or being about to act in contravention of the Aliens Order may (notwithstanding any intervening prosecution) be placed, by a constable or immigration officer, on board any ship belonging to the same owners for removal from the U.K. " Ship " includes " Aircraft." This power expires on the lapse of two months from the date of the last arrival of the alien in the U.K.

Any alien landing or embarking at any place in the U.K. (which includes attempting to land or embark) must, on being required to do so by an immigration officer or constable acting under general or special directions of the Secretary of State, make a declaration as to whether or not he is carrying or conveying any letters, written messages or memoranda, or any written or printed matter, including plans, photographs and other pictorial representations and, if required, produce these, and the officer may search such alien and baggage belonging to him or under his control to ascertain if he is carrying such letters, etc., and may examine and detain, for such time as he may think proper for the purpose of such examination, any letters, etc., produced to him or found on such search. (Aliens Order, 1920, article 3, as amended).

In each district for which there is a separate police force, the chief constable must act as registration officer and must (1) keep for his district a register of the aliens resident therein and required to be registered and enter the prescribed particulars—see the First Schedule and S.R. & O., 1939, No. 1059 ; (2) furnish to the Secretary of State copies of entries, as may be prescribed ; and (3) supply registration certificates on such terms as to payment as may be prescribed. (Aliens Order, 1920, article 8). The obligations on aliens to register, etc., are fully set out in Part 2.

Every alien must, on demand made at any time by any constable, immigration officer or member of H.M. Forces acting in the course of his duty, either—

- (a) If registered, produce his registration certificate, or
- (b) in any other case, produce a passport furnished with a photograph of himself or some other document satisfactorily establishing his national status and identity,

or must give a satisfactory explanation of failure to produce such certificate, passport or document. An alien who fails to produce on demand as aforesaid a certificate, passport or document may be detained pending enquiries and, while so detained, is deemed to be in legal custody (and may be photographed and fingerprinted by any person authorised by the Secretary of State—S.R. & O., 1942, No. 95). (Aliens Order, 1920, article 6c).

The duties of hotel-keepers and others to keep a register of persons staying on their premises are detailed in article 7 of the Aliens Order, 1920. The register must at all reasonable hours be open for inspection by any officer of police or any person authorised by the Secretary of State.

The Secretary of State may authorise a chief constable to grant to an individual alien a special permit dispensing with compliance with any general order made under article 8 of the Aliens Order, 1920, which deals with protected areas.

A chief constable may give to an enemy alien written permission to have in his possession or under his control in the United Kingdom any of the articles specified in article 9A of the Aliens Order, 1920—explosives, more than three gallons of inflammable liquid, motor car, motor-cycle, sea-going craft, aircraft, camera, large-scale map, nautical chart, etc.

Powers are given to chief constables, if so authorised by the Secretary of State, in circumstances set out in article 10 of the Aliens Order, 1920, to close clubs and restaurants of the type there described. When such an order has been made, any constable, if authorised by his chief, may enter, if necessary by force, and search or occupy the premises.

#### **Animals (Diseases of).**

Section 43 of the Diseases of Animals Act, 1894, empowers any constable to stop, detain and examine any animal, vehicle, boat or thing to which an offence or suspected offence against the Act relates, and require the same to be forthwith taken back to or into any place or district wherefrom or whereout it was unlawfully removed and he may execute and enforce that requisition. Any person called by a constable to his assistance has like powers. The constable must forthwith make a report in writing to his superior officer. The powers of arrest under this section are noted in chapter 8. The powers given under this section now apply to poultry (Diseases of Animals Act, 1935); and see the Rabies Order, 1938, article 12.

### Animals (Protection of).

If any constable finds any animal so diseased or so severely injured or in such a physical condition that, in his opinion, having regard to the means available for removing the animal, there is no possibility of removing it without cruelty, he shall, if the owner is absent or refuses to consent to the destruction of the animal, at once summon a duly registered veterinary surgeon, if any such resides within a reasonable distance and if it appears by the certificate of such veterinary surgeon that the animal is mortally wounded or so severely injured or so diseased or in such a physical condition that it is cruel to keep it alive, it shall be lawful for the constable, without the consent of the owner, to slaughter the animal, or cause it to be slaughtered with such instruments or appliances and with such precautions and in such manner as to inflict no unnecessary suffering and, if the slaughter takes place on any public highway, to remove the carcase or cause it to be removed therefrom. (Protection of Animals (Scotland) Act, 1912, section 10). If the veterinary surgeon certifies that the injured animal can without cruelty be removed, and if the person in charge fails to remove it, the constable may do so.

If no veterinary surgeon is reasonably accessible, what are the police to do? The Act gives no guidance.

Where a person having charge of a vehicle or animal is apprehended by a constable for an offence under the Act of 1912, the police may take charge of the vehicle or animal and deposit it in a place of safe custody until the termination of the proceedings or until the court shall direct it to be delivered to the person charged or the owner. (Section 11).

### Army.

#### (1) Powers of Billeting.

In normal times, the power to billet troops in civilian premises is restricted; in times of emergency, it is extensive and drastic.

(1) *In normal times*, billeting proceeds upon a document known as a route. Any constable for the time being in charge at any place mentioned in the route must, on demand by the military and production to him of the route, billet on the occupiers of victualling houses in that place such number of officers, soldiers and horses as are mentioned in the route and stated to require quarters. The production of a route must be accepted as conclusive evidence of authority to demand billets in accordance with the route. (Army Act, section 103).

The term "victualling houses" includes all inns and hotels, whether licensed or not, livery stables and other premises specially

mentioned in section 104 of the Army Act, as amended by section 18 of the Army (Annual) Act, 1920. No officer or soldier may be billeted (in normal times) in any private house, or in any canteen or in certain other types of premises specified in section 104.

These billeting powers extend to all officers and soldiers of H.M. regular forces; all horses belonging to H.M. regular forces and all horses belonging to the officers of such forces for which forage is for the time being allowed by H.M. Regulations. (Section 105 of the Army Act). With certain modifications (section 181) they apply to members of the auxiliary forces when subject to military law.

The keeper of a victualling house may, instead of receiving the troops or horses in his own premises, tender alternative accommodation in the immediate neighbourhood. If the constable approves of this alternative as "good and sufficient," he may accept it. (Army Act, section 106).

The police authority may cause to be made out annually a list of persons liable to billets, specifying the number of soldiers and horses to be billeted on each person. The list must be kept "at some convenient place open for inspection at all reasonable times by persons interested." Persons who feel themselves aggrieved may complain to a court of summary jurisdiction which, after notice to persons interested, may order amendment. (Army Act, section 107). This list merely determines the proportion in which billets are to be distributed among victualling houses. It does not relieve the keeper of a victualling house from receiving a number in excess of that in the billet list for whom quarters are required. (*Sharratt v. Scotney*, 1892, 2 Q.B. 479).

No more billets may, at any time, be ordered than there are effective officers, soldiers and horses present to be billeted. When made out by the constable, billets must be delivered to the commanding officer or N.C.O. demanding them or to some other authorised officer. A keeper of a victualling house who feels aggrieved may apply to a justice, who may order removal elsewhere of such number of troops or horses as he thinks just. A constable having authority in a place mentioned in a route may act, for billeting purposes, in any locality within a mile of such place, unless some constable having authority there is present and undertakes the billeting. The constable must observe the rules set out in the second schedule. (See next paragraph). A justice has power to vary a route and to direct billets to be given in a place more than one mile from any place mentioned in the route. A justice may require the constable to give a written account of the details of his billeting. (Army Act, section 108).

The main points in the rules in the second schedule are—no meals beyond two days ; billets (except in case of necessity or on justice's order) within one mile of the place mentioned in the route ; less distant accommodation first ; man and his horse at same premises (except in case of necessity) ; one soldier for one or two horses, two soldiers for four horses, and so on in proportion (except in case of necessity) ; soldier and his horse not more than 100 yards distant (except in case of necessity) ; where soldiers with horses are billeted on a victualling house with no stables, constable, on written requisition of commanding officer, must billet the soldiers and horses, or horses only, on the keeper of some other victualling house with stables—subject to payment, on a court order, by the victualler relieved ; officer demanding billets may allot them among his men as he thinks fit and vary the allotment ; commanding officer may, where practicable, require that not less than two men shall be billeted in one house. (Army Act, 2nd schedule).

A constable commits an offence if he billets on any person not liable ; receives, demands or agrees for any money or reward to excuse or relieve a person from being entered in the list of billets or from liability to billets or any part of his liability ; billets or quarters, without consent of the person affected, any person or horse not entitled to be billeted ; or neglects or refuses, after sufficient notice is given, to give billets properly demanded. (Army Act, section 109).

A constable must observe the directions given to him for the due execution of his billeting powers by the police authority. That authority or any member thereof or any justice of the peace may, if it seem necessary, and must, in the absence of a constable, exercise the powers of the police in connection with billeting. But a person having or executing any military office or commission must not be concerned, as a justice or constable, in billeting troops under his command. (Army Act, section 120). Where a justice makes out billets, the remedy of an aggrieved party, under section 108, is by complaint to a court of summary jurisdiction, not to another justice.

(2) *In case of emergency*, billeting proceeds upon a billeting requisition requiring *chief officers of police* to provide billets for such number of officers, soldiers, horses and vehicles as may be specified in the requisition. The requisition specifies the period for which billets are required. (Army Act, section 108A, as amended).

Note particularly (1) that the requisition is directed to chief officers of police (i.e., chief constables) only ; but that the powers and duties may now be delegated to "any individual constable, or any class of constables" subject to such restrictions as the

chief constable thinks fit (Army (Annual) Act, 1941, section 3); and (2) that vehicles are now included—see the Army (Annual) Act, 1939, section 4.

The persons upon whom billeting demands may be made under a requisition are not only the keepers of victualling houses (as in normal times under a route), but also “the occupiers of all public buildings, dwelling-houses, warehouses, barns and stables,” and, as regards vehicles only, “the occupier of any building or land.” In the case of unoccupied premises, the owner is treated as occupier.

In selecting the persons required to provide billets, and in determining the number to be billeted, a chief constable must, so far as practicable, have regard to the convenience of the several occupiers and must act in accordance with any general instructions issued by the police authority.

A justice has no power to vary a requisition.

The rules in the second schedule (see above) apply to emergency billeting under a requisition—except that (1) the limitation of the time during which meals must be supplied is suspended and (2) the requirement that less distant premises are to be first occupied does not apply.

As to the distinction between refusal to provide accommodation and inability to do so, see *Macmillan v. Wright*, 1944, S.L.T. (Sh. Ct.) 5.

## (2) Impression of Carriages.

The provisions to this end, both in normal times and in case of emergency, are to be found in sections 112 to 121 of the Army Act, as amended. These provisions are too elaborate to be set out here in detail. Briefly, the impressment proceeds upon a justice's warrant following upon the production (in normal times) of a route or (in case of emergency) of a requisition. The warrant is directed to “some constable or constables having authority” in the place contemplated. The normal impressment is of “such carriages, animals and drivers as are stated to be required for the purpose of moving the regimental baggage and regimental stores of the forces mentioned in the route in accordance with the route.” (“Carriage” is a vehicle for carriage or haulage other than one specially constructed for use on rails” (Section 190 (40A)). In case of emergency, the range of the impressment is much wider—see section 115, as amended, especially by the Army (Supply of Food, Forage and Stores) Act, 1914, and the Army (Annual) Act, 1925, section 10.

**(3) Deserters and Absentees.**

The distinction between desertion and absence without leave is one of intention, turning upon the offender's state of mind ; and in practice it may be difficult to draw the line. Desertion implies some overt act, such as running away, coupled with an intention to quit the service, or some overt act, such as concealment, coupled with an intention to evade some particular important service—as where a soldier, on the eve of embarkation, hides, emerging when his unit has sailed. Absence without leave is typified by the case of a soldier overstaying his leave without lawful excuse—i.e., simple failure, without disguise, concealment or the like, to return to his unit at the stipulated time.

(1) *Procedure on arrest* (a) without warrant, (b) on warrant. Upon reasonable suspicion that a person is a deserter or absentee, it is lawful for any constable (or, if no constable can be immediately met with, for any officer or soldier or other person) to apprehend him. Having done this, he must forthwith bring him before a court of summary jurisdiction—sheriff court, J.P. court or police court. The arrest may be made without a warrant, or it may proceed upon a warrant granted by a judge, sheriff, justice or magistrate who has been satisfied by evidence on oath that a deserter or absentee is, or is reasonably suspected to be, within his jurisdiction. (Army Act, section 154 (1) and (2)).

The court, if satisfied either by evidence on oath or confession that the person brought before it is a deserter or absentee without leave must forthwith cause him either (a) to be delivered into military custody or (b) "until he can be so delivered, to be committed to some prison, police station, or other place legally provided for the confinement of persons in custody, for such reasonable time as appears to the court reasonably necessary for the purpose of delivering him into military custody"—i.e., until an escort can arrive from his unit ; but it must arrive within a reasonable time. (Section 154 (4)).

A court, however, is not bound to act upon a confession. It may remand for further enquiry into the truth or falsehood of a confession which is not capable of being tested there and then. (Section 154 (5)).

The underlying principle of the provisions summarised in the preceding three paragraphs is that a person claimed by the army as a deserter or absentee is entitled to have his status determined by a civil (non-military) court. To this end, he must be presented to a magistrate, justice or sheriff (a) if he has been arrested without warrant and (b) if he has been arrested on warrant. To this rule

there are, in strict law, no exceptions and the rule applies whatever may be the attitude of the person concerned after, or at the time of, his arrest.

(2) *Procedure on surrender.* Where a person surrenders himself to a constable as being a deserter or absentee without leave, the officer in charge of the police station to which he is brought must forthwith enquire into the case and, if it appears to him from the confession of that person that he is a deserter or absentee, may cause him to be delivered into military custody without bringing him before a court. In such case, the officer must send "to the Army Council or as they may direct" a certificate signed by himself as to the fact, date and place of such surrender. The appropriate form is A.F.O. 1617. (Army Act, section 154 (9)). The practice in Edinburgh is to intimate the surrender to the military police locally and, on the arrival of an escort, to hand over the "surrender" along with a completed A.F.O. 1617 on a receipt. The form gives instructions for police guidance.

A.F.O. 1617 is, in subsequent proceedings by the military, accepted as evidence of the facts stated in it. (Army Act, section 163).

(3) *General comments.* 1. Usually, the police become aware of an individual's desertion or absence through receipt of Army Form B. 124, which gives the age, name and rank of the offender, his regimental number, his description, any identifying marks, his date and place of enlistment, birthplace, details of the desertion, and any information which would assist in tracing him, such as his home address. This document may be accepted as proving the facts set out in it; but it remains to apply it to the suspect. This requirement may be satisfied by the suspect's admission, by his being found at the address given and having the distinguishing marks specified in the document, by the testimony of civilians who know his identity, by his possession of letters linking him with the person named and of corresponding measurements and marks, or by any other satisfactory evidence. Where time has not permitted of formal notification by Army Form 124, a constable would be safe to act upon the statements of two army witnesses who can speak to the fact of desertion or absence without leave and can positively identify the suspect. The writer understands that, on occasion, action is taken on a telegram from the military authorities. This might be held sufficient; but certainly it would be unwise to proceed upon a telephone message.

2. During the present emergency, the Army Act has, with substantial modifications, been applied to women in the services. Women are in no circumstances to be dealt with as deserters, but

may be dealt with as absentees without leave. See S.R. & O., 1941, No. 856 ; 1941, No. 1026 ; 1942, No. 11.

3. During the present emergency, special provisions have been made with regard to members of the armed forces of the Dominions and the United Nations. These provisions are too elaborate to allow of adequate summary in this volume. Reference may be made to the Visiting Forces (British Commonwealth) Act, 1933 ; the Allied Forces Act, 1940 ; the Defence (Armed Forces) Regulations, 1939, No. 4 ; the United States of America (Visiting Forces) Act, 1942 ; the following Statutory Rules and Orders—1940, Nos. 1012, 1373, 1818 ; 1941, No. 47 ; 1942, Nos. 2 and 966 ; and the various official instructions issued for the guidance of the police.

4. Important circulars are from time to time issued, on matters affecting members of the armed forces of the Crown, by the Scottish Home Department.

#### (4) Railway Warrants.

A soldier who informs the police that he has lost his railway pass or is otherwise without the means of rejoining his unit should be referred to the nearest army recruiting office. If there is no such office in the neighbourhood and if the unit is not less than 10 miles distant, he should be given a railway warrant. If the police suspect his *bona fides*, enquiry by telegram should be addressed to his C.O. before issue of the warrant. If the unit is within 10 miles, he should be told to proceed on foot. (Scottish Office Consolidated Circular, Paragraph 1).

#### Burgh Police (Scotland) Act, 1892.

Many police powers under this Act have already been noted—see the general index. Those noted below are of a miscellaneous character.

##### (1) Street Musicians.

It is lawful for any householder, personally or by his servant or by a constable, to require any street musician or singer to depart from the neighbourhood of the house of such householder ; and every person who continues to sound or play any instrument or sing in any street at any time after being so required to depart incurs a penalty. (Section 391). Note that there is no express power of arrest without warrant.

##### (2) Detention of Prisoner passing through a Burgh.

Any person charged with the commission of a crime or offence, or sentenced to imprisonment, when in the lawful custody of a

constable or warder or prison officer for the purpose of being conveyed to a county, city, burgh, place or prison may, when in or passing through a burgh, be detained for a period not exceeding 24 hours (48 hours if Sunday intervenes) in a cell or lock-up at any police office or station, if the removal of such person through or from the burgh is delayed from any cause ; but the chief constable or officer in charge of the station must be satisfied that the person in custody cannot at once be conveniently removed. (Section 469).

**(3) Watchmen may be placed at Premises left open.**

“ Where any constable or officer on duty shall discover that the window or door of any house, shop, warehouse, factory or other premises within the burgh has been left open or unlocked or is otherwise insecure, it shall be lawful for such constable or officer to put a watchman in immediate charge thereof, at the expense of the tenant or party occupying such premises.” Section 470).

**(4) Register of Persons Convicted.**

The chief constable (of a burgh to which the Act applies) must cause to be kept a register of the name, description, crime, and sentence of persons charged with and convicted before the magistrates of crimes and offences and must cause to be entered therein such particulars as he may from time to time be directed to enter by the magistrates or as may be necessary for supplying judicial statistics. The entries, or any extract therefrom, certified by the chief constable, “ shall be taken and received as evidence of every sentence and conviction and of any previous conviction and the particulars thereof.” (Section 502).

**Children and Young Persons.**

A constable may enforce an order made under section 5 of the Children and Young Persons (Scotland) Act, 1937—removal of a child kept in unsuitable premises or by unsuitable persons. The section applies to children whose maintenance is undertaken for reward.

It is the duty of a constable and of a park keeper in uniform to seize any tobacco or cigarette papers in the possession of any person apparently under the age of sixteen whom he finds smoking in any street or public place ; but not if they are in the possession of a person at the time employed by a manufacturer of, or dealer in,

tobacco for the purposes of his business or of a boy messenger in uniform in the employment of a messenger company and employed as such at the time. "Tobacco" includes cigarettes and smoking mixtures intended as a substitute for tobacco. "Cigarettes" includes cut tobacco rolled up in paper, tobacco leaf, or other material in such form as to be capable of immediate use for smoking.

A constable or any person authorised by a justice of the peace may take to a place of safety (which includes a remand home or police station) any person under the age of 17 years who, there is reason to believe, is about to go abroad in contravention of section 25 of the Children and Young Persons Act, 1933. (Section 26).

Any constable having reasonable grounds for believing that a child or young person (i.e., any person under 17 years) is in need of care or protection may bring him before a juvenile court, and meantime may take him to a place of safety. (Children and Young Persons (Scotland) Act, 1937, sections 66 and 71). The phrase "in need of care or protection" is elaborately defined in section 65. The fact that a child or young person is found destitute or is found wandering without any settled place of abode and without visible means of subsistence or is found begging or receiving alms (whether or not there is any pretence of singing, playing, performing or offering anything for sale), or is found loitering for the purpose of so begging or receiving alms, is evidence that he is exposed to moral danger. A child or young person who is in moral danger (or falling into bad associations or beyond control) is "in need of care or protection" if he has no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship.

Section 71 of the Act of 1937 also authorises any constable (or any person authorised by any court or by any justice) to take to a place of safety any child or young person in respect of whom any of the offences mentioned in the First Schedule of the Act has been or is believed to have been committed. The offences in the schedule are—any offence under the Criminal Law Amendment Act, 1885; any offence under sections 12 (cruelty to person under 16 years), 13 (causing seduction or prostitution of girl under 16), 14 (allowing person under 16 years to be in brothel), 15 (causing or allowing persons under 16 years to be used for begging), 22 (exposing children under 7 to risk of burning), or 33 (person under 16 taking part in dangerous performance); any offence in respect of a child or young person which constitutes the crime of incest; any other offence involving bodily injury to a child or young person, which includes lewd practices (*H.M. Advocate v. Lee*, 1923, J.C. 1).

### Convicts on Licence and Supervisees.

The police have, under statute, a duty to supervise (1) holders of licences granted under the Penal Servitude Acts—i.e., “ticket of leave men” and (2) persons placed under police supervision in terms of section 8 of the Prevention of Crimes Act, 1871.

The obligation to keep in touch with the police is imposed by section 5 of the Prevention of Crimes Act, 1871 (licensees), and section 8 of the same Act (supervisees); but, in reading these sections, the substantial alterations made by the Penal Servitude Act, 1891, section 4, and the Statute Law Revision (No. 2) Act, 1893, must be incorporated. Any person to whom these sections apply must, if at large in Great Britain or Ireland, notify the place of his residence to the chief officer of police of the district in which his residence is situated; and whenever he changes such residence within the same police district, notify such change to the chief officer of police of that district; and whenever he is about to leave a police district his intention to the chief officer of that district, stating the place to which he is going, and also, if required and so far as is practicable, his address at that place, and whenever he arrives in any police district must forthwith notify his place of residence to the chief officer of police of such last-mentioned district and, if a male, must also once in each month report himself at such time as may be prescribed by the chief officer of police of the district in which he may be, either to such chief officer himself or to such other person as that officer may direct, and such report may, according as such chief officer directs, be required to be made personally or by letter. Failure to comply with these requirements is excused if “he proves to the satisfaction of the court before whom he is tried either that being on a journey he tarried no longer in the place in respect of which he is charged with failing to notify his place of residence than was reasonably necessary or that otherwise he did his best to act in conformity with the law.

His Majesty may, by order under the hand of a Secretary of State, remit any of the requirements above set forth, either generally or in the case of any holder of a licence or supervisee. (Penal Servitude Act, 1891, section 4 (2)). The remission may be conditional and, if the Secretary of State is satisfied that any condition has been contravened, he may cancel the order. (Criminal Justice Administration Act, 1914, section 26).

The methods of compliance with the requirements of the 1871 Act as amended are given in section 2 of the Prevention of Crime Act, 1879. A licence holder or supervisee satisfies the statutory direction to notify residence or change of residence by personally

presenting himself and declaring his place of residence to the constable or person who, at the time, is in charge of the police station or office of which notice has been given to the licence holder or supervisee as the place for receiving his notification or, if no such notice has been given, to the person in charge of the chief office of the chief officer of police concerned. The power to direct that reports are to be made to "some other person" allows him to direct such reports to be made to the constable or person in charge of any particular police station or office without naming the individual person. Any appointment, direction or authority signed purporting to be by the chief officer of police is, until the contrary is proved, evidence that the appointment, etc., was duly made and evidence that it appears from the records kept by authority of the chief officer of police that a person has failed to notify his residence or change of residence or to report is *prima facie* evidence of failure; but, if the person concerned alleges that he did notify or report to any particular person, or at any particular time, the court must require the attendance of such persons as may be necessary to prove the truth or falsehood of such allegation.

#### **Customs Consolidation Act, 1876.**

When Customs Officers are executing a search warrant, they may avail themselves of the services of the police, who are required to assist. (Section 205).

#### **Dangerous Drugs.**

Generally, the police play only a relatively minor and local part in the enforcing of the law relating to dangerous drugs. The Department vitally concerned is the Drugs Branch of the Home Office, but in practice this Department must rely upon the police to exercise a local supervision over retail chemists and to keep the Department informed. To this end, routine visits are made by police officers who have a knowledge of the Acts and Regulations. To facilitate regular and effective inspection, a register, or card index, of retail chemists should be kept and the dates of visits and their results noted. Visiting officers should initial and date the last entry in the chemist's register. It is recommended that visiting officers should be in plain clothes and that visits should not be so regularly spaced as to rule out the possibility of surprise. Whenever proceedings are taken, the Home Office should be informed—if for no other reason, because a doctor, as well as the chemist, may be involved, and that is a matter for departmental enquiry. While the police have no express power to ask questions and insist upon an answer, the Government Inspectors have such power. Any refusal to answer proper questions should, therefore,

be reported to the Department. Any unusually large supply of drugs (although it proceeds on a prescription) should be reported to the Department, as also any particular supply which goes on regularly for an undue time.

### Defence (General) Regulations, 1939.

The following police powers and duties are worth noting :— To act as an “authorised examiner” in the special circumstances set out in Regulation 3A ; to remove person from a “protected place” in the circumstances set out in Regulation 12 ; to remove person from a “protected area”—see Regulation 13 ; to search persons found in special areas—Regulation 14A ; to remove trespassers covered by Regulation 15 ; to take steps to secure compliance with a Regional Commissioner’s order applying to a defence area—Regulation 16A ; to remove persons from an area specified in an order, relating to such persons, made under Regulation 18A ; to arrest and detain suspected persons under the powers of Regulation 18D, which should be carefully consulted for its precise terms ; to remove persons, animals, etc., from an area to which a special evacuation order applies—Regulation 21 ; to open public shelters—Regulation 23AC ; to enter premises or board a vehicle or vessel and take steps necessary to secure compliance with the Lighting Orders—Regulation 24 ; to inspect and examine a vehicle and its lamps to test compliance with the Lighting Orders—Regulation 24 ; to take steps to protect persons or property in damaged or dangerous buildings—power to officer not lower than inspector—Regulation 25 ; to stop and inspect animals in order to check compliance with any order made under Regulation 25A ; to enforce directions given, as regards explosives, etc., under Regulation 34 ; to take steps to secure compliance with an order prohibiting processions or meetings made under Regulation 39E ; to exercise the powers under Regulation 42C—closing of undesirable premises ; Regulation 42CB—control of entertainments ; to convey on board his ship a seaman contravening Regulation 47A ; to slaughter dangerous and injured animals in the event of hostile attack—Regulation 79B ; to stop and search vehicles—Regulation 88B ; to retain articles under an authority of the Secretary of State—Regulation 93B ; and see Regulation 94 and Regulation 79.

*Note.*—In view of the temporary nature of the Regulations, it has been thought sufficient to summarise the police powers. Before advantage is taken of these powers, the particular Regulations should be carefully scrutinised for exceptions and qualifications not indicated in the summary.

**Dogs.**

*Rabies Order, 1938.* Note that the police powers in section 43 of the Diseases of Animals Act, 1894 (see under "Animals"), apply—article 12.

A constable receiving notice of rabies must (1) transmit the information by the most expeditious means to the veterinary inspector of the area; (2) inform an inspector of the local authority.

**Dog Licences Act, 1867.**

Any constable may at any convenient time inspect the register of licences kept for the current or preceding year. (Section 6). He may also demand to see and read a dog licence (section 9) or exemption. (Customs Act, 1878, section 22). Failure to produce the licence or exemption within a reasonable time after demand involves a penalty.

**Excise.**

Upon request, constables must assist excise officers in the execution of their proper duties. (Excise Management Act, 1834, section 16).

**Firearms.**

The need to control drastically traffic in and possession of firearms and ammunition was brought home to the authorities by the conditions prevailing in this country in the period following the conclusion of hostilities at the end of the war of 1914-18. A system of control was devised and given legislative sanction in the Firearms Act, 1920, now virtually displaced by the consolidating Act of 1937. The responsibility of maintaining this control was thrown upon the police, upon whom three main duties were placed

(1) *The granting, renewal, variation and revocation of firearm certificates.* These are the personal responsibility of the chief constable in each county or burgh maintaining a separate police force. In the event of his illness or absence or a vacancy in the office, the duties may be discharged by one or other of the officers named in article 4 of the Firearms (Scotland) Rules, 1937. The forms set out in the second schedule to the Rules must be used. The duties of interviewing applicants, making preliminary enquiries, and sifting and reporting upon the applications may, of course, be delegated to subordinates.

The circumstances in which the purchase, acquisition or possession of firearms and ammunition requires to be covered by a

certificate and the numerous exceptions are fully set out in the Act of 1937 and are too elaborate for repetition here. At the headquarters of the larger forces, one finds a special Firearms Department manned by experts who have made themselves familiar with the enactments and official instructions. In this connection, the Memorandum for the Guidance of the Police issued by the Scottish Office in 1938 may be recommended. In a properly maintained Firearms Department, one finds careful and exhaustive records, preferably in card-index form.

In deciding whether or not to grant an application for a certificate, a chief constable must keep in mind the prohibition against granting a certificate to a person whom he has reason to believe to be prohibited (e.g., under section 19 (3) or section 21) or to be of intemperate habits or unsound mind or to be for any reason unfitted to be entrusted with the firearm to which the application relates. (Firearms Act, 1937, section 2).

Subject to that prohibition, the application *shall* be granted if the chief constable is satisfied that the applicant has a good reason for purchasing, acquiring or having in his possession the firearm or ammunition in respect of which the application is made and can be permitted to have it without danger to the public safety or to the peace. The certificate (for which, with certain exceptions, a fee of five shillings is payable and further fees on renewal, variation or replacement, if lost, are exigible) specifies the conditions, if any, the nature and number of the firearms and, as regards the ammunition, the quantities authorised to be purchased and to be held at any time. Unless previously revoked or cancelled, it continues in force for 3 years, but is renewable. A chief constable may at any time, by notice in writing, vary the conditions, except such as are prescribed and may require the holder to deliver the certificate, within 21 days, for amendment. The holder may also apply for variation. Powers of revocation, in circumstances specified, are given to a chief constable. (Firearms Act, 1937, section 2; for fees, section 3).

The prescribed conditions, which may not be varied and which are printed in every certificate, are found in article 1 of the Firearms (Scotland) Rules, 1937. They refer to keeping the firearms and ammunition in a secure place, reporting their loss or theft and notifying without delay change of permanent address. The chief constable may add other conditions in any particular case.

An applicant for or holder of a certificate who considers himself aggrieved by a chief constable's refusal to grant or vary or renew a certificate or by its revocation may appeal to the sheriff. (Firearms Act, 1937, section 2).

What is a "good reason" which compels the grant of a certificate, subject to the proviso as to public danger already noted? Some guidance is afforded by paragraph 26 of the Memorandum already mentioned and by two recent decisions in Dundee Sheriff Court.

In the first case (*Todd v. Neilans*, 1940, S.L.T. (Sh. Ct.) 12), the appeal failed, the chief constable being held justified in refusing the application. In the application form, the only reason given in support of the application was "target practice," but, at the hearing before the sheriff, Todd was allowed to state and argue two additional reasons—that he had to travel abroad on business and that he required a revolver for signalling from a small sailing boat. All three reasons were rejected by the sheriff. "If a certificate were to be granted to every person who said he wanted it for target practice, the country might bristle with revolvers, very much to the detriment of public safety; and, further, that reason might easily be given by any person as a cloak for the possession of a revolver for some other and even less legitimate reason." Travelling abroad was a reason for refusing a certificate, not for granting it. "This country does not wish its national to cross the Channel and land in a foreign country and on landing be found in possession of a revolver. Arrest or detention would probably follow and all sorts of awkward questions might arise." As for signalling from a boat, that was a reason which could not be taken seriously. The sheriff added that he would be slow to interfere with a decision by a chief constable who had "specially good opportunity of being well informed on the facts, circumstances and merits of the question."

In the second case (*Anderson v. Neilans*, 1940, S.L.T. (Sh. Ct.) 13), the same sheriff allowed an appeal against the same chief constable's refusal to renew a certificate in respect of four revolvers. The applicant was an ex-army officer. The revolvers were part of a collection of firearms, twenty-seven in all, which he had had in his possession for periods varying from 28 to 48 years. The collection was kept in the applicant's house, in a cabinet with a glass front, with no special protection against thieves. In the absence of any countervailing reason to the contrary, the sheriff held the application should have been granted. "In considering every case, the chief of police should keep in mind that the duty which the Act puts upon him is the judicial or quasi-judicial one of deciding whether the reason given for the possession of the firearm is in itself a good one, not whether objections can be raised against it, and accordingly he should endeavour to view the matter, in the first place, from the standpoint of the applicant rather than from that of a possible objector." It was not enough that there was

a risk of theft by intruders. "It is the individual—his position, character, loyalty, training, and presumed ability to look after revolvers safely—that counts."

In November, 1943, a number of appeals were taken against the decision of the chief constable of Kent to refuse renewal of certain firearm certificates. From press reports, it would appear that the court approved of the chief constable's attitude and particularly of his view that the defence by a civilian of his own property was an insufficient reason for his possession of a revolver.

(2) *Registration of Firearm Dealers.* Section 8 places upon the chief constable of each county or burgh maintaining a separate police force a duty of keeping, in the prescribed form (see the Firearms (Scotland) Rules, 1937), a register of firearms dealers. The section should be consulted for its precise terms and the exceptions noted. In circumstances detailed in the section, the chief constable may, after reasonable notice, remove a name from the register. Any person aggrieved by a refusal to register or by the removal of his name may appeal to the sheriff. A firearms dealer is a person who, by way of trade or business, manufactures, sells, transfers, repairs, tests or proves firearms or ammunition to which Part 1 of the Act applies.

A certificate of registration must be issued and this must, before 1st June in each year, be surrendered and an application for renewal lodged (fee £1). Failure to comply results, after notice and the expiry of 21 days without application, in the removal of the name from the register. (Firearms Act, 1937, section 9).

(3) *Registration of Places of Business of Firearms Dealers.* On applying to be registered as a firearms dealer, the applicant must state his place of business, which is entered by the police in a register. A chief constable, if satisfied that the place is one at which the applicant cannot be permitted to carry on business without danger to the public safety or to the peace, may refuse to enter that place of business in the register. Any person aggrieved by his decision may appeal to the sheriff. (Firearms Act, 1937, section 10).

Generally, it should be noted that the discretion of a chief constable to grant, renew or revoke certificates and to refuse to register a firearms dealer does not extend to the holder of an authority from one of the Defence Departments to manufacture, sell, transfer, purchase, acquire or possess a prohibited weapon. (Firearms Act, 1937, section 17).

The powers of arrest, search and seizure under the Act of 1937 are dealt with elsewhere in this volume—see the Index under .

### Fires.

The senior officer of police present at any fire may close for traffic any street and may stop or regulate the traffic in any street whenever in the opinion of that officer it is necessary or desirable to do so for the purpose of extinguishing fire or for the safety or protection of life or property. (Fire Brigades Act, 1938, section 14).

As to power to enter premises, see chapter 13.

A chief constable, if he considers it necessary for the ends of justice, is entitled to retain possession of the premises in which a fire has occurred until 24 hours after the circumstances have been reported to the Burgh Prosecutor. (Burgh Police (Scotland) Act, 1892, section 297). Note that sections 291-295 are repealed by the Fire Brigades Act, 1938.

### Food and Drugs.

In the main, the Food and Drugs Acts are enforced by the local authorities through specially appointed officers. Powers of sampling may be given by the local authority to "any constable." (Food and Drugs (Adulteration) Act, 1928, section 16—still un-repealed in its application to Scotland).

### Gun Licences Act, 1870, section 9.

A constable is empowered to demand from any person using or carrying a gun (not being a person in the naval, military or volunteer service of H.M. or in the constabulary or other police force using or carrying a gun in the performance of his duty) the production of a licence granted under the Act. If the person challenged does not produce a gun licence or a game licence and permit the constable to read it, the constable may require him to declare to him immediately his name and address. Refusal carries a penalty and entitles the constable to arrest the offender.

### House to House Collections Act, 1939.

In reading this Act, special attention must be given to the "Application to Scotland" clause—section 10. In the appended summary, effect has been given to the alterations made by that section.

*Local and temporary collections.* If the chief constable of a county or of a burgh which is a county of a city is satisfied that a proposed collection for charitable purposes is local in character and likely to be completed within a short time, he may grant to the person principally concerned in the promotion a certificate, which

has the effect of exempting, during the period specified in the certificate, the promoter and any other person authorised by him to promote the collection or act as collector from the main provisions of the Act ; but the provisions of section 5, and section 6 and of section 8 so far as they relate to those sections, still apply. Section 5 deals with the unauthorised use of badges, section 6 with the power of the police to demand a collector's name (see below), and section 8 with penalties. (Section 1 of the Act). Note that in smaller burghs the exemption must come from the magistrates, not from the chief constable.

The functions conferred on a chief constable by the Act, or by regulations made thereunder, may be delegated by him to any police officer not below the rank of inspector. (Section 7).

*Power to demand Collector's Name, Address and Signature.* A police constable may require any person whom he believes to be acting as a collector for the purposes of a collection for a charitable purpose to declare to him immediately his name and address and to sign his name. Failure to comply involves a penalty ; but no right of arrest without warrant is given. (Section 6). Note that an exemption under section 1 does not operate to suspend this power.

#### **Identity Cards.**

The National Registration Act, 1939, established a national register and provided for the issue of registration (identity) cards. A constable in uniform is among the persons who may require any person responsible for the custody of an identity card to produce the card to him. Where it is not so produced, the card must be produced within two clear days at a specified police station. (Form NR/HO/1 is issued to persons failing to produce the card on demand). Cards of children under 16 remain in the custody of parents or guardians and they are responsible for producing them. (National Registration Act, 1939, section 6 ; Defence (General) Regulations, 1939, Article 20AB ; National Registration Regulations, 1939, as amended, No. 37).

On failure to produce the card on demand, the constable may require the person on whom the demand was made to furnish orally or in writing particulars of name, sex, age, occupation, residence, marriage, membership of Reserves of Auxiliary Forces or Civil Defence Services or Reserves. (Regulation 20AB).

#### **Licensing (Scotland) Acts.**

*Objections to Granting or Renewal of Certificate.* At any general meeting of the Licensing Court, objections against the granting

or renewal of a certificate may be made verbally or in writing by (among others) any chief constable or superintendent of police. No notice of objection need be given. (*Licensing (Scotland) Act, 1903*, section 20). As to appearance before the court of appeal, see section 29.

*Special Permissions.* At least 48 hours before applying for a special permission under section 40 of the Act of 1903, notice must be served upon the chief constable or superintendent of police of the district. The notice must specify the applicant's name and address, the place and occasion in respect of which the permission is required, the period for which it is to be in force and the hours to be specified in the permission. When obtained, the special permission must be lodged with the police at least 24 hours before the commencement of the entertainment. The chief constable or superintendent must then furnish the holder with a certified copy, which must be shown by him to any constable requiring to see it. (1903 Act, section 40).

The Court of Session approved of the action of a chief constable who wrote to an innkeeper, calling his attention to complaints of disorder on the premises on the occasion of a special permission and intimating that, if there were a recurrence, he would oppose the grant of future special permissions. (*Menzies v. Macdonald, 1899, 1 F. 977*).

*Emergency Supplies.* An officer of police, including any constable in charge of a police station, may sign an order authorising a licensee to give out and supply exciseable liquor in case of sickness, accident or emergency. The order must state why the liquor is required. (1903 Act, section 55, as amended by the Temperance (Scotland) Act, 1913, section 11).

*Riotous, Quarrelsome or Disorderly Persons.* Every person who is riotous, quarrelsome or disorderly on licensed premises and who refuses to quit upon being requested to do so by the occupier or manager or his agent or servant or by any constable, and every person who refuses to quit such premises at closing time commits an offence and may be taken into custody by any constable; and "all constables are hereby authorised and empowered to assist in expelling such riotous, quarrelsome or disorderly person refusing to quit the premises at the hour of closing." (1903 Act, section 68).

*The "Black List."* The provisions of section 72 of the Act of 1903 are rarely, if ever, put in operation.

*Club Registers.* Club registers and copies of rules lodged with the sheriff clerk must be, at all reasonable times, open to inspection by a chief officer of police or any constable authorised by him in writing without fee. (1903 Act, section 77).

*Grant and Renewal of Club Certificates.* The sheriff clerk must forthwith give notice to the chief constable of an application by a club for registration. The chief constable (among others) may lodge objections to the grant or renewal of a certificate within 21 days of receipt of the notice of application. At the same time, a copy of the objections must be sent to the club secretary. (1903 Act, section 79 ; for competent grounds of objection, see section 81 ; and for power to cancel certificate, section 85).

*Extension of Permitted Hours.* The holder of a certificate or a secretary of a club must give not less than 14 days notice in writing to the superintendent of police of the district of the date on which it is proposed to take advantage of the provisions of section 3 of the Licensing Act, 1921. He must also apply to the Licensing Court not less than 14 days before the half-yearly meeting for a declaration that the premises are suitable. The court makes such enquiry as they may deem fit. The declaration, or the court's refusal, must be intimated to the applicant and the chief constable forthwith. At a subsequent meeting, the court may, on a report by the chief constable submitted to the clerk not less than 14 days before the meeting (or on its own motion) review the declaration. Withdrawal of a declaration must forthwith be intimated to the applicant and the chief constable. (Licensing Act, 1921, section 3, and the Licensing (Scotland) Rules, 1921).

#### **Mental Defectives (Escaped).**

If a patient in an institution for defectives, or absent from such an institution under licence or without a licence, or any person under guardianship as a defective escapes, he may at any time within three months thereafter be apprehended without warrant by any constable or by the managers of the institution or guardian or any person authorised by them in writing, and brought back to the institution or other place of safety or under guardianship. (Mental Deficiency (Scotland) Act, 1913, section 32).

#### **Merchant Shipping.**

*Deserters.* "If in the United Kingdom a seaman or apprentice is guilty of the offence of desertion or of absence without leave, or otherwise absents himself from his ship without leave, the master, any mate, the owner, the ship's husband or consignee of the ship may, with or without assistance of the local police officers or constables, convey him on board his ship and those officers and constables are hereby directed to give assistance if required ; provided that, if the seaman or apprentice so requires he shall first be taken before some court capable of taking cognizance of the

matter to be dealt with according to law." (Merchant Shipping Act, 1894, section 222). Note the effect upon these powers, during the present emergency of the Defence (General) Regulations, 1939, No. 47A. As to the execution of warrants directed against seamen on fishing boats, see sections 380, 381.

### **Moneylenders.**

An applicant to a Licensing Court for a moneylender's certificate must, on lodging his application, forthwith serve by registered post a copy of the application upon the chief constable. If the chief constable desires to object, he must lodge with the clerk of court a notice intimating his objection and specifying the grounds of objection and at the same time furnish the applicant with a copy. When the application is considered, the chief constable may be heard if the court so decides. (Moneylenders (Scotland) Rules, 1927).

### **Navy.**

#### **(1) Deserters.**

The procedure to be followed is found in section 9 of the Naval Deserters Act, 1847, and section 50 of the Naval Discipline Act, 1866. A constable has power to arrest any person whom he may reasonably suspect to belong to H.M. navy and to be a deserter or improperly absent from his duty and cause him to be brought before a justice, who may, if satisfied by confession or evidence on oath, (1) commit him to prison or (2) if the arrest was made in the vicinity of one of H.M. ships in commission, order him to be taken on board.

By section 50 of the Naval Discipline Act, as amended, power is given to certain naval officers to issue a warrant for the apprehension of a deserter or absentee. Unless he denies his identity, a person so arrested need not be brought before a court.

#### **(2) Billeting and Impressment.**

In circumstances of emergency, the provisions of the Army Act as to billeting and impressment of carriages, etc. (see under "Army") are applied to the Navy by the machinery of the Naval Billeting, etc., Act, 1914, which should be consulted for its precise terms.

### **Pedlars.**

The duty of granting pedlars' certificates is placed upon the chief constable of the district in which application is made, but see section 22 of the Act of 1871, which allows delegation of duties. The applicant must have resided in the district for one month and the police must be satisfied that he is above 17 years of age,

a person of good character and a person who intends in good faith to carry on the trade of pedlar. Forms of application and of the certificate appear in schedule 2 of the 1871 Act. The fee payable is five shillings. A certificate remains in force for one year. A register of certificates must be kept. Entries in such register, and any copy of such entries certified by the chief constable to be a true copy, are evidence of the facts stated therein. If a chief constable refuses an application, the applicant has a right of appeal to a court of summary jurisdiction, as set out in section 15. (Pedlars Act, 1871). Note that the necessity for indorsement of certificates to make them valid in another district was dispensed with by the Pedlars Act, 1881.

A pedlar must, on demand, produce and show his certificate to (among others) a constable. (1871 Act, section 17). On refusal, or if he has no certificate or if he refuses to allow or prevents or attempts to prevent opening or inspection of his pack, box, bag trunk or case by a constable, the pedlar may be arrested. (Section 18 of the Act of 1871). Section 19 gives express power to a constable to open and inspect the pack, etc.

The definition of "pedlar" in section 3, and the exceptions in section 23, of the Act of 1871, should be carefully noted.

#### **Poaching Prevention Act, 1862.**

The powers of search and seizure have been noted in the preceding chapter. It remains to be noticed that the constable who has made a successful search may apply to a justice or sheriff for a summons against the offender. There is no power of arrest without warrant.

#### **Post Office.**

Section 67 of the Post Office Act, 1908, as amended by section 10 of the Post Office (Amendment) Act, 1935, penalises persons who wilfully obstruct or molest, or incite others to obstruct or molest, an officer of the Post Office in the execution of his duty or, whilst in a post office or within any premises belonging to any post office or used therewith, obstructs the course of business. An officer of the Post Office may require an offender to leave the premises and, should he refuse or fail to comply, may remove him. All constables are required on demand to assist in removing every such person.

#### **Public Health.**

While in general the provisions of the Public Health (Scotland) Act, 1897, are to be enforced by the local authorities through officials appointed for that purpose, certain powers are given to the

police. It may be sufficient to mention that the "chief constable or superintendent of police" are among the persons for whom the local authority may demand admission under section 18; that constables are under a duty of reporting nuisances (section 19); that the police have power to search vehicles, barrows, baskets, bags, sacks or parcels for unsound food and generally to assist the authorities in enforcing the provisions of section 43; that a copy of a veterinary surgeon's certificate under section 43 must be sent to the chief constable; that an order to remove an infected person without proper lodging may be addressed to any constable (section 54); that an order to detain such person in hospital may be carried into execution by any constable (section 55); and generally that the police must aid the authorities in the enforcement of the Act (section 169).

#### **Public Order Act, 1936.**

In reading this Act, special attention should be paid to the "application to Scotland" clause (section 8). In the notes appended, effect has been given to the alterations made by that section.

Section 1 prohibits the wearing, in a public place or at a public meeting, of uniform signifying association with any political organisation or with the promotion of any political object; but allows a chief constable, with the consent of a Secretary of State, if satisfied that the wearing of such uniform on any ceremonial, anniversary or other special occasion will not be likely to involve risk of public disorder, by order to permit it either absolutely or subject to conditions specified in the order.

Section 2 (1) empowers the magistrates (not, be it noted, the chief constable, as in England) in circumstances in which they reasonably apprehend that a proposed procession may occasion serious public disorder, to give directions and impose conditions as detailed in the sub-section.

If a chief constable is of opinion that by reason of particular circumstances existing in a burgh (or part of it) the powers conferred upon the magistrates will not be sufficient to enable him to prevent serious public disorder being occasioned by the holding of public processions, he must apply to the magistrates for an order prohibiting, for such period not exceeding three months as may be specified in the application, the holding of all public processions or of any class of public processions so specified either in the burgh or in any part of it, and the magistrates may, with the consent of a Secretary of State, make an order either in terms of the application or with such modifications as may be approved by the Secretary of State. (Section 3 (2)).

Section 6 adds to the provisions of the Public Meeting Act, 1908, a power in favour of any constable who reasonably suspects any person of contravening section 1 of the Act of 1908 (which relates to disorderly conduct for the purpose of preventing the transaction of business), if requested to do so by the chairman, to require the person to declare his name and address. If the person refuses or gives a false name and address, he commits an offence and, on his failure or if the constable reasonably suspects him of giving a false name and address, the constable may without warrant arrest him.

In the event of the chief constable's illness or absence or a vacancy, his powers may be exercised by a person named by the Secretary of State. (Section 9 (4)).

The temporary suspension of certain of the powers and provisions of the Public Order Act, 1936, by Regulation 39E of the Defence (General) Regulations, 1939, should be noted.

### **Public Stores Act, 1875.**

A constable authorised in writing by the head of a public department may stop, search and detain any vessel, boat, or vehicle in or on which there is reason to suspect that any of H.M. stores stolen or unlawfully obtained may be found or any person reasonably suspected of having or conveying in any manner such stores. (Section 6).

### **Road Traffic.**

The main powers and duties of the police under the Road Traffic Acts appear below :—

#### **(1) Production of Driving Licence.**

Any person driving a motor vehicle on a road must, on being required by a police constable, produce his driving licence for examination, so as to enable the constable to ascertain the name and address of the holder of the licence, the date of issue, and the authority by which it was issued. Failure to comply involves a penalty ; but if, within five days after the production of the licence was so required, the licensee produces the licence in person at such police station as may be specified by him at the time its production was required, he is not to be convicted. (Road Traffic Act, 1930, section 4 (5)).

#### **(2) Production of Insurance Certificate.**

Any person driving a motor car on a road must, on being so required by a police constable, produce his certificate. Failure to comply involves a penalty, but, as in the case of the driving

licence, this penalty is avoided by personal production, within five days, at a police station specified by him at the time when production was required. (Road Traffic Act, 1930, section 40). Further, if in any case where, owing to the presence of a motor vehicle on a road, an accident occurs involving personal injury to another person, the driver of the vehicle does not at the time produce his certificate to a police constable or to some person who, having reasonable grounds for so doing, has required its production, the driver shall as soon as possible and in any case within 24 hours of the occurrence of the accident report the accident at a police station or to a police constable and thereupon produce his certificate. So far as production of the certificate is concerned, an alternative is again provided of personal production within five days after the occurrence of the accident at a police station specified by the driver at the time when the accident was reported. (Road Traffic Act, 1930, section 40).

The requirement of production of a certificate is satisfied by producing for examination the relevant certificate of insurance (section 36) or certificate of security (section 37) or such other evidence that the vehicle was not being driven in contravention of section 35 of the Act of 1930 as may be prescribed—see Motor Vehicles (Third Party Risks) Regulations, 1941.

#### **(3) Name and Address.**

The driver of a motor vehicle who is alleged to have driven recklessly or carelessly must, on being so required by any person having reasonable grounds for so requiring, give his name and address. Refusal, or the giving of a false name and address, involves a penalty. (Road Traffic Act, 1930, section 20). See also section 22, which is detailed below.

#### **(4) Power to stop Motor Vehicle.**

Any person driving a motor vehicle on a road must stop the vehicle on being so required by a police constable in uniform. Failure to stop involves a penalty. (Section 20).

#### **(5) Duty to stop and to report in case of Accident.**

If in any case, owing to the presence of a motor vehicle on a road, an accident occurs whereby damage or injury is caused to any person, vehicle or animal (i.e., horse, cattle, ass, mule, sheep, pig, goat or dog), the driver of the vehicle must stop and, if required so to do by any person having reasonable grounds for so requiring, give his name and address and also the name and address of the owner and the identification marks of the vehicle. If, in the case of any such accident, the driver for any reason

does not give his name and address to any person as aforesaid, he must report the accident to a police station or to a police constable as soon as reasonably practicable and in any case within 24 hours of the occurrence. (Road Traffic Act, 1930, section 22). The provisions of section 40, already referred to, should also be kept in mind. The duty to report emerges only if particulars were not given on the spot to—e.g., the driver of another vehicle involved in the collision. (*Adair v. Fleming*, 1932, J.C. 51). The motorist must stop immediately after the accident occurs. It is obligatory to stop and give particulars and it is no excuse that he subsequently reported. (*Dawson v. Winter*, 149 L.T. 18).

#### (6) Public Service Vehicles.

The following are the main police powers :—

(1) Any police constable is entitled without payment at any reasonable time to inspect and take copies of or extracts from the record kept by the Traffic Commissioners in terms of section 83 of the Road Traffic Act, 1930.

(2) A driver or conductor, when acting as such, must, if requested by any police constable (or other person having reasonable cause), give particulars of his licence, his name and the name and address of the person by whom he is employed (Conduct of Drivers, etc., Regulations, 1936, article 4).

(3) On being required by any police constable (among others), a licensee must produce his licence for examination or state the address at which it will be available for examination during the next five days and, in the latter event, make arrangements for the licence to be so available on demand at any reasonable time during that period ; provided that a demand for the production of a licence at an address stated by a licensee shall not be made until he has had reasonable time to make arrangements for it to be available. (Drivers', etc., Licences Regulations, 1934, article 11).

(4) Any passenger contravening the Conduct of Drivers, etc., Regulations may be removed from the vehicle by the driver or conductor or, on the request of the driver or conductor, by any police constable. A passenger in or on a vehicle who is reasonably suspected by the driver or conductor of contravening the regulations must give his name and address to a police constable or to the driver or conductor on demand. (Article 12).

#### (7) Warning of Prosecution.

It is a condition of the conviction of a motorist for speeding or reckless or careless driving that either (a) he was warned at the time the offence was committed that the question of prosecuting

him "for an offence under some one or other of the provisions aforesaid" (i.e., the provisions relating to speeding, reckless driving and careless driving) would be taken into consideration or (b) within 14 days of the commission of the offence a summons was served upon him or (c) within the same period a notice of intended prosecution was served upon him or the registered owner of the vehicle. Failure to comply with this requirement is, however, no bar to conviction if neither the name and address of the accused nor that of the registered owner could with reasonable diligence have been ascertained in time or if the accused by his own conduct contributed to the failure. (Road Traffic Act, 1930, section 21).

This provision in favour of the motorist makes it desirable that the police should (a) wherever possible, give at the time a sufficient warning and (b) see that the police report reaches the appropriate prosecutor as quickly as may be, so that he may, within the 14 days allowed, either serve a summons or serve a notice. In view of the comments of the judges in *Watt v. Smith*, 1943, S.L.T. 101, the only safe formula to be used by the police, in giving a warning at the time, would seem to be—"It is my duty to warn you that the question of prosecuting you for speeding or for careless driving or for reckless driving will be taken into consideration." It is certainly not sufficient merely to say (as the constable did in the case cited) "I've got to warn you that the circumstances of the accident will be reported to the Fiscal for the purpose of considering a prosecution." A warning 35 minutes after the offence but given at the earliest time reasonably possible after the arrival of the police and while the parties were still at the scene was held to be "at the time." (*Jeffs v. Wells*, 100 J.P.N. 406).

#### (8) Owner's Duty to give Information to the Police.

The owner of a motor vehicle must (1) give such information as he may be required by or on behalf of a chief constable to give for the purpose of determining whether the vehicle was or was not being driven in contravention of section 35 of the Act of 1930 (which relates to insurance against third-party risks) on any occasion when the driver was required, under section 40, to produce his certificate. An owner failing to give the information required is subject to a penalty. (Road Traffic Act, 1930, section 40 (3)); and (2) where the driver of the vehicle is alleged to be guilty of an offence under the Act of 1930, give such information as he may be required by or on behalf of a chief constable to give as to the identity of the driver. Failure involves a penalty, unless the owner shows to the court's satisfaction that he did not know

and could not with reasonable diligence have ascertained who the driver was. (Road Traffic Act, 1930, section 113).

It should be noted that the duty to give information which may lead to the identification of a driver alleged to be guilty of an offence applies not only to the owner but to "any other person." (Section 113).

**(9) Production of Documents under Road and Rail Traffic Act, 1933.**

A police constable may at any time require the person in charge of a goods vehicle to produce, and permit him to inspect and copy, any document which by the Act of 1933 or by regulation made under it must be carried on, or by the driver of, the vehicle and for that purpose may detain the vehicle for such time as is necessary. (Section 18).

**(10) Weighing of Motor Vehicles.**

Certain specially authorised constables have powers of weighing vehicles and trailers—see section 27 of the Road Traffic Act, 1930.

**(11) Testing of Brakes, etc.**

Any police constable in uniform is empowered to test and inspect either on a road or, subject to the consent of the owner of the premises, on any premises where the vehicle is, any brakes, silencers or steering gear fitted to a motor vehicle or trailer. The power of testing and inspection of a vehicle in premises is not to be exercised unless either the owner of the vehicle consents or notice of the date and time at which it is proposed to carry out the test and inspection has been given to him personally or left at his address not less than 48 hours before the time proposed or sent to him by registered post not less than 72 hours before such time. (Construction and Use Regulations, 1941, No. 95). Note the definition of owner given in the regulation. The requirement of notice to, or consent of, the owner of the vehicle, does not apply in the case of a test and inspection made within 48 hours of an accident to which section 22 of the Road Traffic Act, 1930, applies and in which the vehicle has been involved. (See the paragraph headed "Duty to stop and to report in case of Accident" on page 193).

These statutory powers of testing and inspection are supplementary to, and leave unaffected, the common law powers of a procurator-fiscal to direct the police to take steps to secure essential evidence to support a serious charge. After a collision between a motor car and a pedal cycle, which resulted in fatal injuries to the cyclist, the owners of the car removed it to a garage for repairs. Before anything had been done to affect the braking system, the police, on the instructions of the procurator-fiscal, stopped the

repairs and instructed the garage to hold the car at their disposal. Four days later, they removed the car without protest, for the purpose of testing the brakes. No notice of the test had been given to the owners of the car and their consent had not been obtained. The driver and the owners of the car were subsequently charged with statutory offences arising out of the condition of the brakes. Evidence of the result of the test of the brakes was held to be admissible. Lord Moncrieff suggested that, in all cases in which a motor car which is to be tested by the criminal authorities is in neutral custody, it is desirable that the procurator-fiscal "should take active means to see that the owner of the car, as also all other persons who may be criminally affected as a result of the test, have an opportunity of being represented at the test." (*Watson v. Muir*, 1938, J.C. 181).

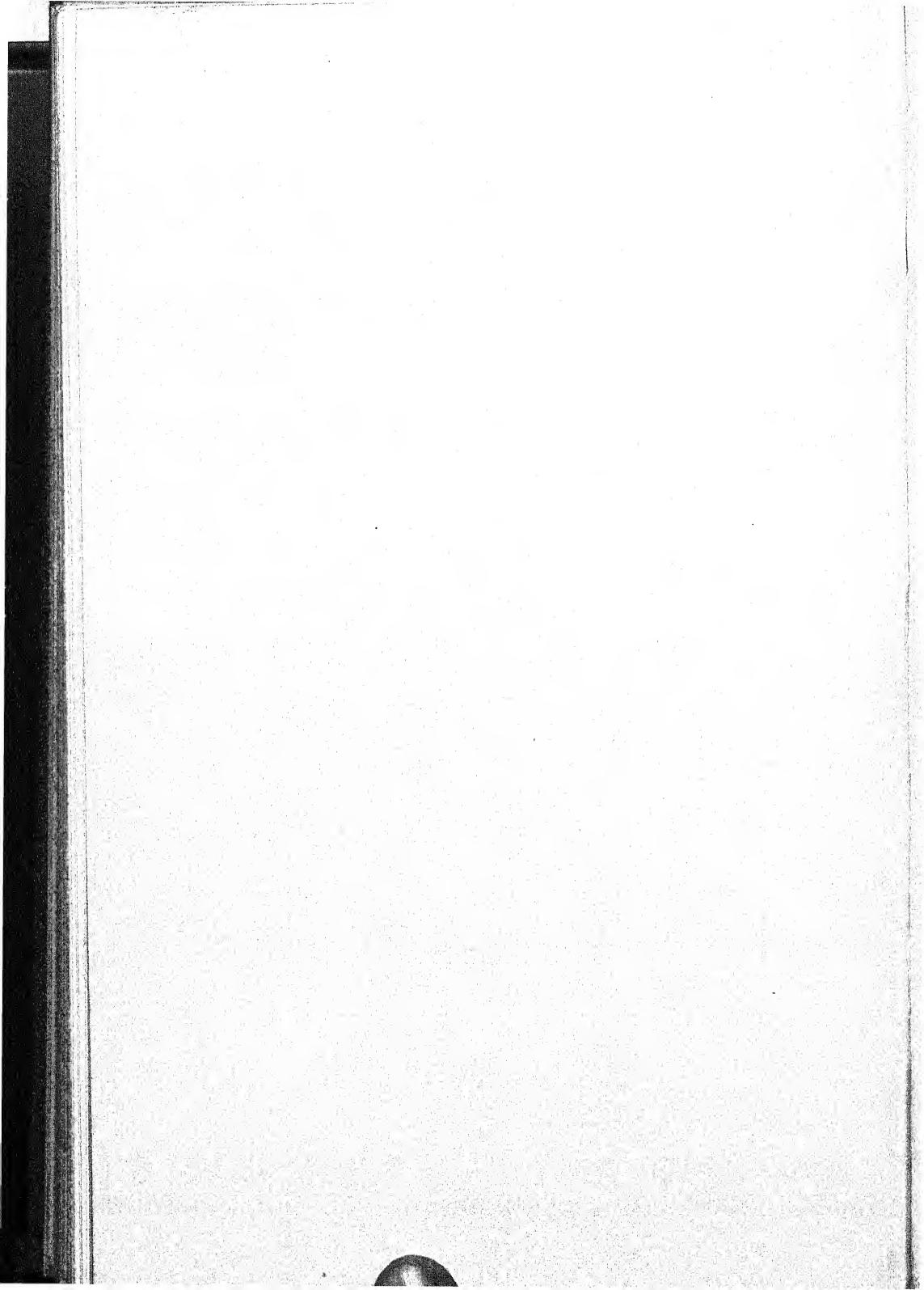
**(12) Emergency Treatment—Information by the Police.**

A chief constable must, if so requested by a person who alleges that he is entitled to claim a payment under section 16 of the Road Traffic Act, 1934, furnish any information at his disposal as to the identification marks of any motor vehicle which that person alleges to be a vehicle out of the use of which the bodily injury arose and as to the identity of the address of the person who was using the vehicle at the time of the event out of which it arose. (Road Traffic Act, 1934, section 17).

**(13) Speed Limit—Exemption.**

The provisions of any enactment, or of any statutory rule or order imposing a speed limit on motor vehicles does not apply to any vehicle on an occasion when it is being used for fire brigade, ambulance or police purposes, if the observance of those provisions would be likely to hinder the use of the vehicle for the purpose for which it is being used on that occasion. (Road Traffic Act, 1934, section 3). The driving of a car by a private citizen for the sole purpose of ascertaining the speed at which a police car was travelling was held not to be use of the vehicle for police purposes. (*Strathern v. Gladstone*, 1937, J.C. 11).

The powers of arrest under the Road Traffic Acts are to be found in the list of statutory powers of arrest in chapter 8. The right to seize false documents is noted in the list of powers of seizure in chapter 13.



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